Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1977
CERTIORARI GRANTED JANUARY 9, 1978

TABLE OF CONTENTS

I. Relevant Docket Entries in the United States Court of Appeals (D.C.Cir.) in *Pacifica Foundation* v. *FCC and USA*, No. 75–1391 ---------- Page 1

II. Relevant Pleadings Before and Orders of the Federal Communications Commission in Citizen's Complaint Against Pacifica Foundation, Station WBAI (FM), New York, N.Y ---------- 2

1. Letter of Complaint dated November 28, 1973 ---------- 2
2. Response of Pacifica Foundation (WBAI) dated January 3, 1974 3
3. Response of Pacifica Foundation (WBAI) dated April 3, 1974 -- 5
4. FCC Memorandum Opinion and Order, FCC 75–200, Released February 21, 1975, 56 FCC 2d 94 6
5. FCC Memorandum Opinion and Order, FCC 76–271, Released March 23, 1976, 59 FCC 2d 892 -- 41

III. Opinions and Orders of the United States Court of Appeals (D.C.Cir.) in *Pacifica Foundation* v. *FCC and U.S.*, No. 75–1391 ---------- 45

1. Opinions of United States Court of Appeals for the District of Columbia Circuit ---------- 45

254–987—78

III. Opinions and Orders of the United States Court of Appeals—Continued
2. Judgment of the United States Court of Appeals for the District of Columbia Circuit---------- Page 115
3. Orders of the United States Court of Appeals for the District of of Columbia Circuit on petition for rehearing and suggestion for rehearing *en banc*---------- 117, 118

I

Relevant Docket Entries in the United States Court of Appeals (D.C. Cir.) in PACIFICA FOUNDATION *v.* FCC AND USA

No. 75–1391

Date	Filings-Proceedings
1975	
Apr. 18	Petition to Review, FCC Memorandum Opinion and Order, FCC 75-200.
Apr. 30	FCC certified list of items in the record.
1977	
Mar. 16	Judgment of Court of Appeals. Opinion filed by Circuit Judge Tamm. Concurring opinion filed by Chief Judge Bazelon. Dissenting opinion filed by Circuit Judge Leventhal.
Apr. 15	Petition for Rehearing and Suggestion for Rehearing *En Banc*.
May 10	Orders of United States Court of Appeals for the District of Columbia Circuit denying Petition for Rehearing and Suggestion for Rehearing *En Banc*. Circuit Judges Leventhal, MacKinnon, Robb and Wilkey would grant suggestion for Rehearing *en banc*.

II

Relevant Pleadings Before and Orders of the Federal Communications Commission in Citizen's Complaint against Pacifica Foundation, Station WBAI (FM), New York, N.Y.

[Received by FCC Mail Branch on Dec. 3, 1973]

JOHN H. DOUGLAS,
385 MADISON AVENUE,
New York, N.Y. 10017, November 28, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554

GENTLEMEN: On October 30th, in the early afternoon (from approximately 1:30 p.m. to 2:30 p.m.), while driving in my car, I tuned to radio station WBAI in New York City.

I heard, among other obscenities, the following words:

cocksucker	fuck
cunt	shit

and a whole host of others. This was supposed to be part of a comedy monologue.

Whereas I can perhaps understand an "X-rated" phonograph record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control. Any child could have been turning the dial, and tuned in to that garbage.

Some time back, I read that "topless" radio stations were fined for suggestive phrases. If you fine for suggestions, should not this station lose its license entirely for such blatant disregard for the public ownership of the airwaves?

Can you say this is a responsible radio station, that demonstrates a responsibility to the public for its license?

I'd like to know, gentlemen, just what *you're* going to do about this outrage, and, by copy, I'm asking our elected officials the same thing.

Incidentally, my young son was with me when I heard the above, and, unfortunately, he can corroborate what was heard.

Yours truly,

cc: Senator James Buckley; Senator John Pastore; Morality in Media

MR. JOHN H. DOUGLAS.

[Received Jan. 8, 1974]

PACIFICA WBAI FM 99.5,
359 EAST 62ND STREET,
New York City 10021, January 7, 1974.

WILLIAM B. RAY,
Chief, Complaints and Compliance Division, Broadcast Bureau, Room 332, Federal Communications Commission, Washington, D.C. 20554

Re: 8310-m; C12-47

DEAR MR. RAY: I am writing on behalf of Pacifica Foundation, licensee of non-commercial educational Station WBAI-FM, New York, in response to the above-referenced letter from your office dated December 10, 1973 forwarding a letter of complaint from Mr. John H. Douglas.

Mr. Douglas' complaint is based upon the language used in a satirical monologue broadcast during the course of a regularly scheduled live program "Lunchpail," hosted by Paul Gorman, on October 30, 1973 at approximately 2:00 p.m. The monologue in question was from the album "George Carlin, Occupation: FOOLE," Little David Records, distributed by Atlantic Recording Corporation. On October 30, the "Lunchpail" program consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language. The subject was also discussed with listeners who called-in. Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society.

The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the

broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue.

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.

His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

If you have any further questions regarding this matter, please contact Pacifica Foundation's Washington communications counsel, David Tillotson, Esquire, Arent, Fox, Kintner, Plotkin & Kahn, 1200 Federal Bar Building, 1815 H Street NW, Washington, D.C. 20006.

Sincerely,

EDWIN A. GOODMAN,
President, Pacifica Foundation.

HENRY S. HEIFETZ,
Program Director, Station WBAI.

CC: David Tillotson

Re: 8310-M C1-379

APRIL 3, 1974.

Mr. WILLIAM B. RAY,
Chief, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission, Washington, D.C. 20554

DEAR MR. RAY: I am writing to you on behalf of Pacifica Foundation, licensee of non-commercial, educational station WBAI, New York, N.Y., in response to the above-referenced letter from your office dated March 26, 1974 which requested a tape of the program, "Lunchpail," broadcast over WBAI-FM on October 30, 1974.

We regret to inform you that no recording of this program was made; and since the program was done live and extemporaneously, no script was prepared in advance.

If you have any further questions with respect to this matter, please contact Pacifica's Washington Communications counsel, David F. Tillotson, Esq., of the firm, Arent, Fox, Kintner, Plotkin, and Kahn; 1815 H Street NW., Washington, D.C. 20006.

Sincerely,

LARRY JOSEPHSON,
General Manager.

EDWIN A. GOODMAN,
President, Pacifica Foundation.

FCC 75-200

Before the Federal Communications Commission

Washington, D.C. 20554

File No. BRH-13

IN THE MATTER OF A CITIZEN'S COMPLAINT AGAINST PACIFICA FOUNDATION STATION WBAI (FM), NEW YORK, N.Y.

Declaratory Order

MEMORANDUM OPINION AND ORDER

(Adopted February 12, 1975; Released February 21, 1975)

By the Commission: Chairman *Wiley* concurring in the result; Commissioners *Reid and Quello* concurring and issuing statements; Commissioner *Robinson* concurring and issuing a statement in which Commissioner *Hooks* joins.

1. During the past several years, the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves. In 1970, the Commission focused on this problem in *Eastern Educational Radio* (WUHY-FM), 24 FCC 2d 408 (1970) and issued a notice of apparent liability which held

"indecent" the use of the words "fuck" and "shit" during a pre-recorded broadcast interview.[1]

2. Since that decision, the problem has not abated and the standards set forth apparently have failed to resolve the issue. Moreover, the Supreme Court in *Miller* v. *California,* 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency in *WUHY*. Further, *Sonderling Corp.,* 27 RR 2d 285, *recon. denied* 41 FCC 2d 777 (1973) was affirmed sub. nom. *Illinois Citizens Committee for Broadcasting, et al.* v. *FCC,* D.C. Cir. No. 73-1652, decided November 20, 1974, and is the first judicial decision upholding the FCC's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.[2] In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in

---

[1] The Commission is empowered to impose sanctions on licensees who violate § 1464 of Title 18 of the United States Code which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C.A. 1464.

[2] The Court upheld the Commission's finding of obscenity against a radio call-in show which, during hours when the audience could include children, had broadcast explicit discussions of ultimate sexual acts in a titillating context. Accordingly, it did not have to "reach the question of the constitutionality of [the Commission's] interpretation and application of term 'incident.'" [Sic.] Slip Op. 10, n. 5. The Commission had defined "indecent" as material that is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value, 24 FCC 2d at 412.

considering the public's complaints about the broadcast of "indecent" language. This order does not deal with the somewhat different problem of "obscene" language which was discussed by the Commission in *Sonderling Corp., supra.*

THE COMPLAINT

3. First, we consider the facts which give rise to this review. On December 3, 1973, the Commission received a complaint from a man in New York City stating that in the early afternoon of October 30, 1973, while driving in his car, he heard broadcast by Station WBAI (licensed to the Pacifica Foundation) the words "cocksucker," "fuck," "cunt," and "shit." He stated that "This was supposed to be part of a comedy monologue," that "Any child could have been turning the dial, and tuned in to that garbage," and that "Incidentally, my young son was with me when I heard the above * * *"

4. The cover of the record, which the licensee subsequently identified as having been played in part at approximately 2 p.m. on October 30, 1973, states that it was recorded live at the Circle Star Theatre, San Carlos, California. The segment of the record to which the complainant obviously referred was Cut 5 of Side 2, titled "Filthy Words" and ran 11 minutes and 45 seconds. A verbatim transcript of this material is attached hereto as an Appendix and is incorporated herein by reference.

5. Review of this recorded monologue reveals that it consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public * * * airways * * * the ones you definitely couldn't say * * *" Thereafter there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.

PACIFICA'S RESPONSE

6. On December 10, 1973, the complaint was forwarded to WBAI (FM) with a request for its comments. After receipt of the licensee's initial response, dated January 7, 1974, the Commission, on March 26, 1974, requested that it forward a recording or complete script of the program in question. In response, the licensee stated that the complaint was based on the language used "in a satirical monologue broadcast during the course of a regularly scheduled live program, 'Lunchpail,' hosted by Paul Gorman, on October 30, 1973, at approximately 2:00 p.m." The licensee stated that "the monologue in question was from the album 'George Carlin, Occupation: FOOLE,' Little David Records"; that on October 30 the "Lunchpail" program "consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language," that the subject was also discussed with listeners who called in and that "Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society." The licensee continued as follows:

> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue,

listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, [complainant] is the only person who has complained about either the program or the George Carlin monologue.

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.

His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

In response to the Commission's request for a recording or script of the program, the license, by letter dated April 3, 1974, stated that no recording of the program was made, "and since the program was done live and extemporaneously, no script was prepared in advance."

DISCUSSION

7. At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." But the prohibition against the broadcast of "obscene, indecent, or profane language" was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. 1464. Congress has clearly indicated that both the Department of Justice and the FCC are obliged to enforce section 1464.[3] This declaratory order is not intended to modify our previous decisions recognizing broadcasters' broad discretion in the programming area. For example, in *Pacifica Foundation*, 36 FCC 147 (1964), licenses were renewed where provocative programming had offended some listeners. Pacifica had, however, taken "into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum)." 36 FCC at 149. See also *Anti-Defama-*

[3] Thus Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. 307, 308.

tion League, 4 FCC 2d 190, affirmed 131 U.S. App. D.C. 146, 403 F. 2d 169 *cert. denied* 394 U.S. 930 (1969).

8. Congress, the Commission, and the Courts have recognized that the broadcast medium has special qualities which distinguish it from other modes of communication and expression. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). As we noted in *WUHY–FM, supra:*

> * * * broadcasting is disseminated to the public (Section 3(o) of the Communications Act, 47 U.S.C. 153(o)) under circumstances where reception requires no activity of this [purchasing] nature. Thus it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. 24 FCC 2d at 411. (Footnotes omitted).

The intrusive nature of broadcasting was also recognized in *Sonderling Broadcasting:*

> [Broadcasting] is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show and decide to turn the dial to try something else. While many have loyalty to a particular station or stations, many others engage in this electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of

> radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater. 27 RR 2d at 288.

See also, *Illinois Citizens, supra,* Slip. Op. 11, 15.

9. In view of these unique qualities, we believe that the broadcast medium is not subject to the same analysis that might be appropriate for other, less intrusive forms of expression. As the Supreme Court pointed out in *Burstyn* v. *Wilson,* 343 U.S. 495, 502–503 (1952), "each method [of expression] tends to present its own peculiar problems." And "the mode of dissemination" can be a relevant consideration, particularly when there is "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller* v. *California,* 413 U.S. at 18–19. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.[4]

---

[4] "Possible negative effects on children are concerns unto themselves * * * So long as broadcasting is so all pervasive and can get into those homes where parental guidance is non-existent, it should take advantage of its opportunities. It should not shift its responsibilities * * * ." Quaal & Martin, *Broadcast Management* 57–60 (1968).

10. There is authority for the proposition that the term "indecent" in Section 1464 is *not* subsumed by the concept of obscenity—that the two terms refer to two different things. See *United States* v. *Smith,* 467 F. 2d 1126 (7th Cir. 1972); *Tallman* v. *United States,* 465 F. 2d 282 (7th Cir. 1972); *Gagliardo* v. *United States,* 366 F. 2d 720 (9th Cir. 1966). But the term "indecent" has never been authoritatively construed by the Courts in connection with Section 1464. The Commission did offer a definition of *WUHY-FM, supra,* but relied substantially on the then existing definition of obscenity. In view of subsequent decisions (*Miller* and *Illinois Citizens, supra*), we are reformulating the concept of "indecent."

11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance, *Williams* v. *District of Columbia,* 136 U.S. App. D.C. 56, 419 F. 2d 638 (*en banc* 1969); *Von Sleichter* v. *United States,* 153 U.S. App. D.C. 169, 472 F. 2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder,* 406 U.S. 206, 214 (1972), and cases cited therein.

Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[5] Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, *WUHY-FM,* 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.[6]

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably

---

[5] Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and *carefully schedules for late night broadcasts* those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (emphasis added) 36 FCC at 149, n. 3. See also *WUHY-FM*, 24 FCC 2d at 411.

[6] There is ample authority for the proposition that material may be forbidden distribution among children, because it would be obscene as to them, even though the same material would not be obscene as to adults, and, accordingly, could not be forbidden to circulate among them. See *Ginsberg* v. *New York*, 390 U.S. 629 (1968). The "indecency" definition proposed herein adapts this idea of "variable obscenity" to the realities of both radio transmission and constitutional law.

254-987—78——2

be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. *Miller* v. *California, supra.*

13. We recognize that *Cohen* v. *California,* 403 U.S. 16 (1971) held that an individual could not be punished for walking through a courthouse corridor wearing a jacket on which was written: "Fuck the draft." Significantly, Mr. Justice Harlan also observed in *Cohen* that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue." A decent respect for the right of those who want to be "free from unwanted expression in the confines of one's home" (403 U.S. at 22) dictates that if a licensee decides to broadcast under the circumstances specified in paragraph 12, above, he must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home. *Cf. Rowan* v. *Post Office Dept.,* 397 U.S. 728, 738 (1970).

CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently

offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI–FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY–FM* and *Sonderling.* A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 USC 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F. 2d 316 (1972); *Yale Broadcasting Co.* v. *FCC*, 155 U.S. App. D.C. 390, 478 F. 2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation,

licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker,

motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (la ghter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got

the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, some-

times, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, were going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on

the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass.* (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)"

Concurring Statement of Commissioner Charlotte T. Reid

Today, the Commission takes what I feel to be an important and altogether necessary step in clarifying our position on the broadcasting of indecent language over the public's air waves. I therefore concur with the action of the Commission.

This practice, though engaged in by only a few careless broadcasters, has been a constant source of

irritation over the past several years. Now, the formulation of the standards set forth in our Declaratory Order should serve as a signal to those few offending broadcasters that the Commission is fully cognizant of our public interest responsibilities in this sensitive area. I, for one, will not hesitate to enforce what I perceive to be the clear mandate of the public interest should this abhorrent practice continue.

While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p.m. or 2:00 a.m.

Concurring Statement of Commissioner Quello

While I concur in the adoption of the document clarifying the Commission's position on the broadcasting of indecent language, I nave serious reservations as to the extent of the standard enunciated. I concur in the action only because I recognize the need for an up-dated standard in light of the Supreme Court's ruling in *Miller* v. *California,* 413 U.S. 15 (1973).

I agree wholeheartedly with the conclusion that the words listed in Paragraph 14 "* * * are words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is

garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

I would emphasize that I am not here espousing a prudish critique of the use of words of this nature. I do criticize the broadcast of such words so that they may intrude into the privacy of the home via the unsuspecting listener's radio set.

I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political, or scientific value. They will note that the audience is composed of a minimum of children, and their pre-program *caveats* will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

I must reiterate that I have concurred in the adoption of the new standard on broadcasting of indecent language only for the reason that there must be a line drawn somewhere as to what this Commission will permit to be broadcast. Recognizing the pitfalls inherent in the approach we have taken, I concur in the decision—with trepidation.

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON IN WHICH COMMISSIONER BENJAMIN L. HOOKS JOINS

On reading George Carlin's monologue, my first instinct was to affirm his opinion that these were indeed words "you couldn't say on the public * * * airwaves." Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of noninterference by government in matters of public decency and decorum commands us to reject Carlin's opinion and accept that of Pacifica. On still further refletion, I am led to conclude, along with my colleagues, that even a rigorous respect for the principles of free speech and government nonintervention permits some accommodation to the demands of decency. I think it must be emphasized, however, just how limited is the scope of that accommodation. Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid "indecent" languages over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of governmental restraint in matters of public decorum. Today's decision accordingly gives a narrow meaning to the term "indecent," tying the definition essentially to that which is deemed inappropriate for children without parental supervision. I concur in that determination (subject to some reservations) for reasons which call for elaboration.

I. CONSTITUTIONAL BACKGROUND

The majority's opinion ably examines most of the pertinent constitutional precedent, but it does not offer all of the background which I think is helpful in placing this decision in the larger context of constitutional jurisprudence. For the moment we may fudge the distinction, if any, between the "obscene" and the "indecent." There is no significant jurisprudence explaining the meaning of the latter term. However, the difficulties that have arisen in connec-

tion with obscenity regulation fairly display the problems one runs into where laws seek to control matters that go to the injury of intangibles, like people's sensibilities, rather than palpable damage.[1]

For obscenity regulation, modern times begin with *Roth* v. *United States*, 354 U.S. 467 (1957), which held that whether a work was obscene must turn on "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to a prurient interest." In *Roth*, the Court declined the opportunity to hold that certain kinds of speech relative to the anal or genital taboos were "special" in some sense, and subject to reasonable regulation. Instead, it held that obscene speech was not constitutionally protected at all, and could accordingly be suppressed. This false dichotomy burdens the law of obscenity to this day. By insisting that sexually frank speech belonged to one domain and protected speech to another, the Court made it necessary to decide in case after case the hard question, whether a book was obscene (and thus suppressable) rather than the easy one, whether many people would be offended by it (and thus subject it to reasonable regulation but not suppression). What Lockhart and McClure call "the core problem"—what constitutes obscenity—has never been satisfactorily unraveled.[2]

Succeeding cases showed a marked tendency to confine the obscenity definition so as to narrow the class

[1] Where the gist of the offense is more "sin" than "crime" *see* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

[2] Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 Utah L. Rev. 289 (1961).

of books and magazines which could be suppressed by government power. In *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962), the Court, reviewing the Post Office's seizure of a number of magazines which featured pictures of naked men, was asked to consider whether the "prurient interest" part of the *Roth* test referred to the prurient interest of the special audience at whom the magazines were targeted (homosexuals), or that of an average member of the community. Instead of answering that question, the Court asked another: observing that these pictures "could not be deemed so offensive on their face as to affront current community standards of decency," and assuming, arguendo, that pictures of naked men do arouse the prurient interest of certain parts of the population, could Congress have intended the incitement of prurience, *simpliciter*, to be a crime? Said Mr. Justice Harlan for the Court: "* * * one would not have to travel far even among the acknowledged masterpieces [in literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose. * * *" Since *Manual Enterprises*, the idea of "patent offensiveness" has always been a part of the definition of obscenity. In *A Book Named John Cleland's Memoirs of a Woman of Pleasure* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966), the Court was asked to consider the case of a book designed to appeal to a prurient interest in sex, whose language patently exceeded the standards of candor existing in most communities, but which nevertheless possessed considerable artistic and literary merit. The plurality of the Supreme Court held that unless such a work was

"utterly without redeeming social value," it could not be held obscene. *Miller* v. *California*, 413 U.S. 15 (1973) essentially restated and reiterated the main themes of obscenity doctrine as they have been unfolding since 1957. Its chief modification of what went before is to hold that the government need not prove material utterly bereft of redeeming social value, merely that it is without "serious literary, artistic, political or scientific value."[3] 413 U.S. at 24.

Contemporaneous with the unfolding of obscenity doctrine, a different branch of first amendment doctrine developed, which held in narrow check the right of a citizen to insulate himself from the constitutionally protected speech of others. Mr. Justice Black, dissenting in *Breard* v. *City of Alexandria*, 341 U.S. 662 (1951), observed that "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate." How far that corollary of free speech extends has never been clear, and is not clear now. In *Martin* v. *City of Struthers*, 319 U.S. 141, an ordinance forbidding anyone from ringing a doorbell to deliver a handbill was struck down in the instance of a religious handbill. A city ordinance forbidding the use of sound trucks except to disseminate items of public concern was struck down in *Saia* v.

[3] *Miller* also answered a question long vexing to obscenity doctrine: the community standards to be applied in connection with the ascertainment of prurience were those of the *local*, not national, community. See 413 U.S. at 31–33. In connection with broadcasting, the relevant community has special significance. It is safe to assume that the standards of a national community would be applicable to a national broadcast, but we need not consider that issue here, in the context of a local FM radio station.

New York, 334 U.S. 558 (1948).[4] In *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the State's attempt to punish a number of noisy but peaceable demonstrators was held unlawful.[5] In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the Court threw out an anti-blockbusting injunction, saying: "* * * so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419. In *Cohen* v. *California*, 403 U.S. 15 (1971), a jacket bearing the legend "Fuck the Draft" was held protected speech.

Thus, one of the consequences of speech being protected by the First Amendment is that people do not have an unlimited right to avoid exposure to it. In this way, the trend in obscenity doctrine toward carving down the amount of material without the protection of the First Amendment, together with the limited insulation people are entitled to receive from protected speech, work together like scissors-blades on the sensibilities of a great many citizens.[6]

[4] *Cf. Kovacs* v. *Cooper*, 336 U.S. 77 (1949), where the Court upheld an ordinance that banned the use of sound trucks outright. In his concurring opinion, Justice Frankfurter opined that *Kovacs* and *Saia* were irreconcilable. But he was mistaken. Taken together, the two cases say that where sound trucks are allowed at all, their reasonable use as a medium of communication may be a constitutional right.

[5] Compare *Adderly* v. *Florida*, 385 U.S. 39 (1966).

[6] It is vital that it be recognized that the public use of certain words relating to sex and excretion are taboo, in the sense given to that term by Freud: "Taboo is a Polynesian word * * * [which] means uncanny, dangerous, forbidden and unclean. The opposite word for taboo is designated in Polynesian by the word *noa* and signifies something ordinary and generally accessible. Thus, some-

254-987—78——3

II. POLICY CONSIDERATIONS

As the Commission's opinion recognizes, this is essentially a case of first impression. Although *Eastern Educational Radio* (*WUHY-FM*), 24 FCC 2d 408 (1970) did rest squarely on a finding that certain coarse language uttered in an interview was indecent under 18 USC 1464, circumstances have changed since that case was decided. In the first place, our definition of "indecent" in *WUHY* tracked the *Roth-Memoirs* definition of obscenity then in force; since that time, *Miller* v. *California* and its companion cases redefined obscenity; and obviously it is now necessary for us to consider whether and in what way the definition of indecency should also be changed. In the second place, the Court of Appeals in *Illinois Citizens Broadcasting* v. *FCC*, —— F. 2d —— (D.C. Cir. 1974) reserved the definition of "indecency" with a studied explicitness (Slip Op. at p. 10, n. 14) that commands the conclusion that the legal meaning of the term is still very much an open question. It is against this background that the Commission must act.

Although indecent broadcast material is clearly prohibited by 18 USC 1464, as the Commission recognizes, the Supreme Court's recent decision in *United*

(Continued)

thing like the concept of reserve inheres in taboo; taboo expresses itself essentially in prohibitions and restrictions. Our combination of 'holy dred' would often express the meaning of taboo.

"The taboo restrictions are often different from religious or moral prohibitions. They are not traced to the commandment of a god but really they themselves impose their own prohibitions; they are differentiated from moral prohibitions by failing to be included in a system which declares abstinences in general to be necessary and gives reasons for this necessary. The taboo prohibitions lack all justification and are of unknown origin." S. Freud, *Totem and Taboo*, 31, 32 (A. Brill trans. 1918).

States v. *Twelve 200-Foot Reels of Film*, 413 U.S. 123, 130, n. 7 (1973) sheds doubt on whether the term indecent can be given a meaning independent of the meaning of "obscene." The Court there spoke to 19 USC 1305(a) and 18 USC 1462, which prohibits the interstate transportation of "indecent," "lewd," "lascivious," "filthy," or "immoral" materials. The Court held that if it were necessary to do so in order to avoid problems of unconstitutional vagueness and overbreadth, these terms would be limited to patently offensive representations or descriptions of specific "hard-core" sexual conduct of a type deemed to be obscene in the *Miller* decision. But 18 USC 1464, which deals with radio communications, is distinguishable from the provisions of the Code dealing with transportation which the Court construed in *Twelve 200-Foot Reels*. Maybe it is a distinction without a difference but I think our duty requires us generally to assume the constitutionality of the statute if we can find a rational basis for doing so.

Broadcast communications are sufficiently different from other forms of communications to justify a degree of regulation not tolerable for other media. A number of possibly relevant differences can be identified: limitations on the radio spectrum which in general terms permit greater government scrutiny of the use to which the electronic media are put;[7] the fact

[7] Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, (1969) with *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974). I am not sure that the condition of spectrum scarcity is pertinent here where the form of regulation is not directed at securing balance in speech or fuller expression of ideas. Perhaps an argument could be made that the condition of spectrum scarcity does compound the "Gresham's Law" phenomenon which the Com-

that these media enter the privacy of the home[8] are two prominent differences. I could not say that these differences *compel*, either as a matter of precedent or principle, a different standard of decency for broadcast than for other communications; however, I think that they may support moderately greater public demands from the former than from the latter.

Accordingly, I join the Commission's decision that we may proscribe "indecent" programming over the broadcast media—but absolutely crucial to my concurrence is the limited context in which this principle operates. Today's decision does carry us one step beyond *Sonderling*, which dealt with "obscene" material. But it is not, I think, a long step beyond. The concern there was similar to the basic concern here. Despite efforts to put the case for obscenity regulation on grounds of its direct influence on sexual (particularly sexually violent) behavior, a consideration which would be absent here, I do not think that the

---

mission relied on, in part, in *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). But I would look on that argument with caution, for it could imply a more ambitious form of program "quality control" than is acceptable. See *Red Lion*, *supra*, 395 U.S. at 389. See generally, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967).

[8] See *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). It is not clear, however, which way this consideration cuts. The fact that the communication is received in private lessens the aspect of the offense that goes to public outrage; moreover, people have special rights to receive communications in their own homes even if these might be prohibited in any other context. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969). At the same time, however, the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern.

case for governmental intervention of a limited sort can be confined to that fear. The deeper concern about obscenity lies in apprehensions about its subtle, indirect and long-term effects on public attitudes and social mores. So it is with "indecency." While I would not have the government in the business of enforcing morals and good taste, whether in the name of preventing "indecency" or "obscenity," it seems to me legitimate that there be a limited regulation of offensive speech which is purveyed widely, publicly, and indiscriminately in such a manner that it cannot be avoided without significantly inconveniencing people or infringing on their right to choose what they will see and hear. In short, to adopt the Commission's language, I think we can regulate offensive speech to the extent it constitutes a public nuisance.

III. THE PUBLIC INTEREST IN POLICING DECENCY

None of us supposes that invoking the nuisance concept is a talisman with which we can waive off all difficulties in approaching the task of controlling such speech. The reference to nuisance is meant to be more atmospheric than substantive. The governing idea is that 'indecency" is not an inherent attribute of words themselves; it is rather a matter of context and conduct.[9] Compare, *Ginzburg* v. *United States*, 383 U.S. 463 (1966).

---

[9] I initially had some difficulty with the idea that "literary, artistic, political or scientific value" could constitute a defense to allegedly indecent language at one time of the day but not at another. I have concurred in this rule, however, because I understand it simply to carry forward an aspect of the "nuisance" idea—that is, that "indecent" is not a property of language, but arises when dirty words are uttered at inappropriate times or in inappro-

I acknowledge that the logic of this "nuisance" test of obscenity or indecency could carry us much further into the realm of censorship than would be proper. But I also think that the attempt to accommodate the powerful sensibilities that attach to free speech on the one hand, and modesty on the other, is worth the effort. I do not think either interest deserves to be slighted. Yet, in the nature of things, it is easy to get carried away by the momentum of a single principle on either side of the dispute, and to fail to appreciate the validity of the impulses that are inconsistent with it. Some students of government regulation of decency have gone quite far in constructing a broad rationale for government intervention not merely as a means of curbing a "nuisance" in the narrow sense of that term, but more broadly as a means of maintaining some kind of general standard of quality in public manners. Irving Kristol, for example, has recently attempted to construct a case for "liberal censorship" along such lines:

---

priate circumstances. Demonstrating that children are not unsupervised in the audience because of the late hour changes the context, and correlatively it changes the balance to be struck among the competing values, and whether particular language ought to be regarded as illegal or not.

On the issue of artistic value as a defense, one further point should be mentioned. Pacifica's comparison of Carlin with Mark Twain strikes me personally as being a bit jejuene. But no one should suppose that an author must be a giant of letters in order to receive protection for works which have "serious literary [or] artistic * * * value." The Constitution protects lesser literary lights as well as those with the artistic candlepower of Mark Twain. If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being "indecent" within the meaning of the statute.

> [N]o society can be utterly indifferent to the ways its citizens publicly entertain themselves. Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering of animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles. And the question we face with regard to pornography and obscenity is whether * * * they can or will brutalize and debase our citizenry. We are, after all, not dealing with one passing incident—one book, or one play, or one movie. We are dealing with a general tendency that is suffusing our entire culture.

Kristol, *The Case for Liberal Censorship,* in *Where Do You Draw the Line?* 47 (1974). Kristol's argument for "liberal censorship" is similar to the provocative argument of James Fitzjames Stephen a century ago, and of Lord Devlin, in our own time, defending the role of the State in enforcing moral behavior. J. Stephen, *Liberty, Equality, Fraternity* (2d Ed. 1874); P. Devlin, *The Enforcement of Morals* (1968). This is hardly the occasion to examine the pros and cons of the Stephen-Devlin-Kristol thesis.[10] But it is the occasion to state that the legal enforcement of manners is an activity of government with a breathtakingly narrow scope in a free society.[11] And it is an activity that I could not countenance this Com-

---

[10] The classic case against the thesis is, of course, John Stuart Mill's, *On Liberty* (1859), the target of Stephen's (and to a lesser degree Devlin's) attack. For a concise but penetrating modern defense of Mill and a critique of Stephen's and Devlin's arguments, see H.L.A. Hart, *Law, Liberty and Morality* (1963).

[11] Which is not to deny that moral considerations may align with and provide some support for laws whose aim is utilitarian protection of individuals or society, a point well-developed by Hart, *supra.*

mission engaging in. Neither the Communications Act nor 18 USC 1464 invests the FCC with a general power to establish canons of acceptable decency or good taste in programming. We cannot make the claim that Lord Mansfield made for his tribunal:

> Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.

Jones v. *Randall* (1774), quoted in Hart, *supra,* p. 7. However the matter stood in 18th century England—or indeed 20th century England [12]—I trust no one doubts that things are different in the United States today.

Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hard-bitten libertarians

[12] Mansfield's dictum has taken on new life as a result of the House of Lords' decision in *Shaw* v. *Director of Public Prosecutions*, 2 All Eng. Rep. 446 (1961). The opinion of Lord Simonds is particularly noteworthy in this respect: "When Lord Mansfield speaking long after the Star Chamber had been abolished said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offenses which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society."

do not find entirely uncongenial.[13] Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

IV. CONCLUSION

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," *Hudson Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside

[13] Even Mill, second to none in advocating a limited role for government, granted it broader role in regard to minors—those not "in the maturity of their faculties." *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in cases of "backward" societies, *Ibid.* I hope we do not qualify for that exception.

boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by *tour de force*. This agency, in my view, has the power to compel that coexistence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

F.C.C. 76-271

Before the Federal Communications Commission

Washington, D.C. 20554

IN THE MATTER OF A "PETITION FOR CLARIFICATION OR RECONSIDERATION" OF A CITIZEN'S COMPLAINT AGAINST PACIFICA FOUNDATION, STATION WBAI (FM), NEW YORK, N.Y.

MEMORANDUM OPINION AND ORDER

(Adopted: March 19, 1976; Released: March 23, 1976)

By the Commission: Commissioner *Reid* concurring in the result.

1. The Commission has under consideration a "Petition for Clarification or Reconsideration" of its declaratory order in the matter of *Pacifica Foundation,* 56 FCC 2d 94 (1975), filed by the Radio Television News Directors Association (RTNDA). In its order the Commission clarified the standard it employs to determine whether and under what circumstances language depicting sexual and excretory activities and organs is indecent. The Commission concluded that its action was required to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), and to enforce the indecency provision of 18 U.S.C. § 1464.

2. The declaratory order was occasioned by a complaint concerning language broadcast by station WBAI(FM), New York, New York. The Commission

stated that its primary concern was the protection of children from language which most parents consider inappropriate for them to hear:

> * * * the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. 56 FCC 2d at 98.

Thus, the Commission never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it. The Commission emphasized that it did not intend to "stifle robust, free debate on any of the controversial issues confronting our society" nor to "force upon the general listening public debates and ideas which are 'only fit for children.'" 56 FCC 2d at 99. It further noted that the real solution to this problem was the "exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 56 FCC 2d at 100.

3. RTNDA now seeks a ruling to the effect that the Commission "does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program." Citing as an example "audio and video 'actualities' of angry political demonstrations and even more structured political debate, interviews and conversations * * * ", RTNDA states that the order will cause licensees to censor programming and

this would "not only have a deleterious impact on accurate and insightful reporting in sporadic incidents, but would tend to impact over the long run most heavily on news coverage of those persons who, for whatever reason * * * , regularly and publicly use language which a majority of the public considers to be indecent * * * ." Accordingly, RTNDA asserts that the Commission probably did not intend that its standard be applied in such situations, and requests appropriate clarification. Alternatively, if the Commission did intend such an application, it asks that we reconsider.

4. We note that our declaratory order was issued in a specific factual context. We share petitioner's concern that we must take no action which would inhibit broadcast journalism.[1] However, we differ with RTNDA's view that our order will have such an effect. By our order we sought primarily to protect young children from sexually explicit language. See *Illinois Citizens Committee* v. *FCC*, 515 F. 2d 397 (1975). We intimated that such language could be broadcast—in a news or public affairs program or otherwise—when the number of children in the audience was reduced to a minimum, if sufficient warnings were given to unconsenting adults and if in the context used the language had serious literary, artistic, political or sci-

[1] Footnote 5 of RTNDA's Petition calls to our attention the fact that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. *Cf. NBC* v. *FCC*, 516 F. 2d 1101, 1153 (1974); Tamm, J. dissenting. We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes.

entific value. Having said this, we will not comment on the various hypothetical situations posed by RTNDA.

5. Our disinclination to discuss this subject further in the absence of a concrete factual context is in accord with our long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them. *Yale Broadcasting Co.* v. *FCC,* 478 F. 2d 594, 602 (D.C. Cir. 1973); see also Bickel, *The Unpublished Opinions of Mr. Justice Brandeis,* pp. 2–3 (1957).

6. In view of the foregoing IT IS ORDERED, That RTNDA's "Petition for Clarification or Reconsideration" is GRANTED to the extent indicated in footnote 1 and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

III

Opinions and Orders of the
United States Court of Appeals (D.C. Cir.) in
PACIFICA FOUNDATION *v.* FCC AND U.S.

United States Court of Appeals for the District of Columbia Circuit

No. 75–1391

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communications Commission

Argued March 30, 1976—Decided March 16, 1977

Harry M. Plotkin, with whom *Thomas Schattenfield, David F. Tillotson* and *Mary Candace Fowler,* were on the brief for petitioner.

Joseph A. Marino, Counsel, Federal Communications Commission with whom *Ashton R. Hardy,* General Counsel, *Raymond L. Strassburger* and *Richard J. Bodorff,* Counsel, Federal Communications

[Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.]

Commission and *Robert J. Wiggers*, Attorney, Department of Justice, were on the brief for respondent. *Daniel M. Armstrong,* Associate General Counsel, Federal Communications Commission, also entered an appearance for respondents.

Henry Geller and *Charles M. Firestone* filed a brief on behalf of the Committee for Open Media, San Francisco Chapter, as *amicus curiae.*

Before: BAZELON, *Chief Judge,* TAMM and LEVENTHAL, *Circuit Judges.*

Opinion filed by *Circuit Judge* TAMM.

Concurring opinion filed by *Chief Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* LEVENTHAL.

TAMM, *Circuit Judge*: This appeal by Pacifica Foundation (Pacifica) challenges a Federal Communications Commission (FCC or Commission) ruling which purports to ban prospectively the broadcast, whenever children are in the audience, of language which depicts sexual or excretory activities and organs, specifically seven patently offensive words.

Without deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected, we find that the challenged ruling is overbroad and carries the FCC beyond protection of the public interest into the forbidden realm of censorship. For the reasons which follow, we reverse the Commission's order.

I. FACTUAL BACKGROUND

On the afternoon of October 30, 1973, station WBAI, New York, New York (which is licensed to

Pacifica), was conducting a general discussion of contemporary society's attitude toward language as part of its regular programming. The WBAI host played a segment from the album, "George Carlin, Occupation: Foole," Little David Records. Immediately prior to the broadcast of the Carlin monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some. Those who might be offended were advised to change the station and return to WBAI in fifteen minutes. The monologue consisted of a comedy routine that was almost entirely devoted to the use of seven four-letter words depicting sexual or excretory organs and activities.

On December 3, 1973, the Commission received a complaint from a man in New York stating that, while driving in his car with his young son, he had heard the WBAI broadcast of the Carlin monologue. This was the only complaint lodged with either the FCC or WBAI concerning the Carlin broadcast.

The Commission determined that clarification of its definition of the term "indecent" was in order. As a result, in *Pacifica Foundation,* 56 F.C.C. 2d 94 (1975) (hereinafter *Order*), the Commission defined as indecent, language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. The Commission found that the seven four-letter words contained in the Carlin monologue depicted sexual or excretory organs and activities in a patently offensive manner, judged by contemporary community standards for the broadcast medium, and accordingly, were indecent. The Commission prohib-

254-987—78——4

ited them from being broadcast under the authority granted it by 18 U.S.C. § 1464 (1970).[1] As a further rationale for its decision, the Commission cited its statutory obligation to promote the larger and more effective use of radio in the public interest.[2]

The underlying rationale of the *Order* can be traced to the Commission's view of broadcasting vis-a-vis other modes of communication and expression. According to the Commission, the broadcasting medium carries with it certain unique characteristics which distinguish it from other modes of communication and expression. In the Commission's view the most important characteristic of the broadcast medium is its intrusive nature. Unlike other modes of expression, the television or radio broadcast comes directly into the home without any significant affirmative activity on the part of the listener. *See Eastern Educational Radio (WUHY–FM)*, 24 F.C.C. 2d 408 (1970); *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F. 2d 397 (D.C. Cir. 1975). In the *Order* the FCC concluded this intrusive nature was a critical factor due to four important considerations: (1) children have access to radios and in some cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra defer-

[1] 18 U.S.C. § 1464 (1970) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[2] 47 U.S.C. § 303 (1970) provides: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, necessity or interest requires, shall:

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest * * * *."

ence; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. *Order* at 97.

In light of these considerations the Commission felt that questions concerning the broadcast of patently offensive language should be dealt with in a public nuisance context. As a result the Commission determined that the principle of channeling[3] should be borrowed from nuisance law and applied to the broadcasting medium. Rather than prohibit the broadcast of indecent language altogether, the Commission sought to channel it to times of the day when it would offend the fewest number of listeners.

In hopes of avoiding the charge that the *Order* was overbroad, the Commission declared that the channeling was specifically intended to protect children from exposure to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. *Order* at 98.

Finally, the Commission did note that when the number of children in the audience is reduced to a minimum, a different standard might conceivably be used. In such an analysis the definition of indecent would remain the same, however, the Commission would also consider whether the material had serious

[3] The law of nuisance does not say, for example, that no one shall maintain a cement plant; it simply says that no one shall maintain a cement plant in an inappropriate place, such as a residential neighborhood.

literary, artistic, political or scientific value. *Order* at 100.

In concurring statements, Commissioners Reid and Quello felt the *Order* did not go far enough. Commissioner Reid believed indecent language was inappropriate for broadcast at any time. Commissioner Quello was in agreement, commenting that "garbage is garbage" and it should all be prohibited from the airwaves. *Id.* at 102, 103.

Appellant Pacifica argues that section 1464 is unconstitutionally vague unless the term indecent is subsumed by the term obscene as defined in *Miller* v. *California,* 413 U.S. 15 (1973). Pacifica contends that the Supreme Court, in *Hamling* v. *United States,* 418 U.S. 87 (1974) and *United States* v. *12 200 Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), has made it clear that the term indecent, as used in federal criminal statutes, must be construed as referring to material involving the specific types of explicit conduct defined in *Miller* v. *California,*[4] *supra,* in order for the constitutionality of the statute employing the term to be sustained. Pacifica also cites numerous other federal and state court decisions which have invariably held that the term indecent, as used in criminal statutes, refers to material which appeals to prurient interest as distinguished from material

[4] The *Miller* standard is:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.

which is merely coarse, rude, vulgar, profane or opprobrious.[5]

Pacifica argues that the Carlin monologue is not obscene because it does not appeal to any prurient interest and because it has literary and political value. Therefore, Pacifica argues it is entitled to constitutional protection in light of *Miller* and *Hamling, supra.* Pacifica concludes that such constitutional protection means that these words may not be prohibited by section 1464. In addition, Pacifica contends that the non-obscene language used in the Carlin monologue does not come within the fighting words prohibition set forth in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

Finally, Pacifica contends that the FCC standard of indecency, as expressed in the *Order,* is overbroad as it does not assure that programs of serious literary, artistic, political or scientific value will be allowed to air.[6] The amicus brief in this appeal argues that the *Order* is too far-reaching and will have an especially harsh effect on the broadcast of literature depicting minority cultures. In addition, the amicus brief quotes studies,[7] which show that large numbers of children are in the broadcast audience until 1:30 a.m., as further evidence that the *Order* is overbroad.

One week prior to oral argument in this case the FCC released a memorandum and order seeking to clarify its earlier *Order.* The order of clarification[8]

[5] Pacifica's Brief at 24, n. 23.

[6] *See* App. B. at 28, et seq.

[7] Amicus's Brief at 17 *quoting* Statement of John A. Schneider, Before the House Subcommittee on Communications, July 15, 1975, p. 9.

[8] Pacifica Foundation, —— F.C.C. 2d. ——, 36 P&F Radio Reg. 2d 1008 (1976).

was in response to a petition filed by the Radio Television News Directors Association. In the clarification order, the Commission declared that it never intended to place an absolute prohibition on the broadcast of indecent language but only sought to channel it to times of the day when children would least likely be exposed to it.[9] The clarifying order, in attempting to narrow the scope of the original *Order,* ruled that indecent language could be broadcast in a news or public affairs program or otherwise if it was aired at a time when the number of children in the audience was reduced to a minimum, if sufficient warning were given to unconsenting adults, and if the language in context had serious literary, artistic, political or scientific value.[10] The Commission determined that it would be inequitable to hold a licensee responsible for indecent language broadcast during live coverage of a newsmaking event.[11] The Commission thought it better to trust the licensee to exercise judgment, responsibility and sensitivity to the needs, interest, and tastes of the community.[12]

II. Resolution

Despite the Commission's professed intentions, the direct effect of its *Order* is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications. In promulgating the *Order* the Commission has ignored both the statute which forbids it to

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

censor radio communications[13] and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee.[14]

The Commission claims that its *Order* does not censor indecent language but rather channels it to certain times of the day. In fact the *Order* is censorship, regardless of what the Commission chooses to call it. The intent of the Commission is clear. It is to keep language that describes sexual or excretory organs and activities from the airwaves when there is a reasonable risk that children may be in the audience. The Commission expressly states that this language has "no place on radio" and that when children are in the audience a claim that it has literary, artistic, political or scientific value will not redeem it. *Order* at 98.

As the study cited by the amicus curiae, *supra* note 7, illustrates, large numbers of children are in the broadcast audience until 1:30 a.m. The number of children watching television does not fall below one million until 1:00 a.m. As long as such large numbers of children are in the audience the seven words noted in the *Order* may not be broadcast. Whether the broadcast containing such words may have serious

[13] 47 U.S.C. § 326 (1970) provides: "Nothing in this Act [The Communications Act of 1934] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."

[14] *See* Sonderling Broadcasting Corp., 41 F.C.C. 2d. 777 (1973); Jack Straw Memorial Foundation, 29 F.C.C. 2d 334 (1971); Columbia Broadcasting System, Inc., —— F.C.C. 2d ——, 21 P&F Radio Reg. 2d 497 (1971); Oliver R. Grace, 22 F.C.C. 2d 667 (1970).

artistic, literary, political or scientific value has no bearing on the prohibitive effect of the *Order*. The Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*.[15]

Section 326 of the Communications Act specifically prohibits the FCC from interfering with licensee discretion in programming. *Writers Guild of America, West, Inc.* v. *FCC,* No. CV 75-3641-F, No. CV 75-3710-F (C.D. Cal. November 4, 1976). Such interference is exactly what the *Order* calls for. Therefore it is an action which takes the Commission beyond the limits of the powers which Congress has delegated to it. Congress specifically withheld from the Commission any power to censor broadcasts. *Anti-Defamation League of B'Nai B'Rith* v. *FCC,* 403 F. 2d 169 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 930 (1969); 47 U.S.C. § 326 (1970). Any examination of thought or expression in order to prevent publication of objectionable material is censorship. 403 F. 2d 169.

In an effort to sustain the validity of its *Order* the Commission labels its prospective ban a channeling mechanism. The label is unimportant, the effect of the *Order* is critical. The effect is that of censorship and that is beyond the mandate of the FCC.

In past decisions the Commission has recognized the ban against censorship and has taken another tack against indecent language. In *Jack Straw Memorial Foundation,* 29 F.C.C. 2d 334 (1971), the Commission determined that the decision whether to broadcast obscene or indecent language was a licensee decision. In this case, the licensee, after careful consideration, broadcast the record, "Murder at Kent State", which contained language which the licensee considered obscene and ordinarily would not have permitted to be broadcast. The trustees and managerial employees decided that in their judgment the use of the particular language was necessary under the circumstances. In its ruling the Commission held that

> [t]his is a matter of judgment which we conclude the Commission has left to the licensee. In this case, language was not broadcast for shock or sensationalism, but rather for the purpose of presenting a vivid accurate account of a disasterous incidence in our recent history. We conclude that on this exercise of judgment, the licensee conformed to standards prescribed by the Commission as well as its own policies regarding suitability.

29 F.C.C. 2d at 354. In *Oliver R. Grace,* 22 F.C.C. 2d 667 (1970), the Commission, recognizing that section 326 of the Communications Act prohibited it from censoring broadcast matter, held that program choice was the responsibility of the licensee; the licensee was required to ascertain and reasonably serve the needs and interests of his community; and the charge that programs are vulgar or presented without due regard for sensitivity, intelligence, and taste, was not properly cognizable by the Commission, in light of the proscription against censorship. *Id.* at 668.

The importance of independent judgment by local licensees has been affirmed again and again by the FCC and the courts.[16] Perhaps the most important

[15] App. B. at 28-39.

[16] *See Writers Guild of America, West, Inc.* v. *FCC,* No. CV 75-3641-F, No. CV 75-3710-F (C.D. Cal. November 4, 1976); Report on Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C. 2d 418 (1975); Network Programming Inquiry, 39 Fed. Reg. 26372 (1974). En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

ruling for our purpose is the Commission's clarification memorandum regarding the original *Order*. There the Commission recognized that

> in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing. Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language.

Pacifica Foundation, —— F.C.C. 2d ——, 36 P & F Radio Reg. 2d 1008, 1009 n. 1 (1976). Thus the Commission indirectly admitted it had gone too far in banning "indecent" language from the airwaves. The Commission decided it would be better to trust the licensee to exercise judgment, responsibility and sensitivity to the community's needs, interests and tastes. *Id.*

Previously the Commission has readily admitted that its authority in the area of profane, obscene, or indecent language is governed by federal statutes as interpreted by the courts. The FCC has recognized that it must perform its duties in this area without infringing upon constitutional guarantees of freedom of speech and of the press, *Columbia Broadcasting System, Inc.,* —— F.C.C. 2d ——, 21 P & F Radio Reg. 2d 497 (1971), and without violating the statutory obligations of section 326 of the Communications Act. It must continue to do so.

We do not find it necessary to determine whether the term "indecent" can be more narrowly defined than the term "obscene". The FCC's position is that "indecent" language may be distinguished from "obscene" language in that it lacks the element of appeal to prurient interest and that when children are in the audience it cannot be redeemed by a claim that it has

literary, artistic, political or scientific value. *Order* at 98.

This question has confronted other courts but there have been no definitive resolutions as yet. In *Gagliardo* v. *United States,* 336 F. 2d 720 (9th Cir. 1966), the Ninth Circuit left open the question whether indecent, as used in section 1464, could be defined differently from obscene. Although the question of whether indecent might mean something different from obscene was raised in *Tallman* v. *United States,* 465 F. 2d 282 (7th Cir. 1972), it was not resolved since the case had only been tried on the theory that the defendant had uttered obscene language. The question was considered only tangentially in *United States* v. *Smith,* 467 F. 2d 1126 (7th Cir. 1972), where the court reversed a conviction under section 1464 on the grounds that the jury had not been instructed as to the meaning of the statutory terms profane and indecent, even though the case had been presented to the jury under an indictment charging the defendant with uttering obscene, indecent and profane language. In reversing the conviction, the court did not suggest in what way, if at all, indecent language might differ from obscene language. It is evident therefore that the term indecent has never been authoritatively construed by the courts in connection with section 1464. Since we feel section 326 of the Communications Act is dispositive of this appeal we do not find it necessary to resolve this difficult question.

Unquestionably the Commission's *Order* also raises First Amendment considerations. The Commission recognized that Congress had prohibited it from engaging in censorship or interfering "with the right of free speech by means of radio communication." [17] In

[17] 47 U.S.C. § 326 (1970).

the *Order,* the Commission contends that because of its unique qualities the broadcast medium is not subject to the same constitutional standards that may be applied to other less intrusive forms of expression.

There is no doubt that the regulatory authority of the FCC encompasses more than the technical engineering aspect of the broadcast medium. Under its mandate to promote the public interest, the Commission may promulgate rules on a variety of matters, including broadcast programming. However, any such actions by the Commission must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the Communications Act.

The requirements of the First Amendment relating to obscenity are found in *Miller* v. *California,* 413 U.S. 15 (1973). In *Miller,* the Court set forth a subjective standard by which the trier of fact could determine whether material was obscene. The standard developed by the Court involves: (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) artistic, political or scientific value. *Miller,* 413 U.S. at 24.

Applying the *Miller* standard to the language used in the Carlin monologue, it is clear that although the language is crude and vulgar by most standards it is not obscene. The FCC agrees. *Order* at 98. As used, the words do not appeal to the prurient interest.[18] They are merely crude statements and are not used to titillate. Furthermore, the words prohibited by the

[18] *See* App. A at 10–12.

Order may often be connected with programs in the public interest, e.g. plays and live news broadcasts. Thus, these words quite possibly could have literary, political or artistic value. Therefore this non-obscene speech is entitled to First Amendment protection.

The Commission claims an exception from First Amendment requirements in order to carry out its duty to promote the use of radio communications in the public interest. The basis of this claim is that the broadcast medium is unique. Assuming, arguendo, that the FCC has the power to prohibit non-obscene speech from being broadcast, the statute or order instituting such a ban must not be overbroad or vague. *See Young* v. *American Mini Theatres, Inc.,* 96 S. Ct. 2440 (1976). As will be illustrated, the *Order,* in its application of Section 1464, suffers from overbreadth and vagueness.

In *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), the Court held that rigorous constitutional standards apply when government attempts to regulate expression. Furthermore, when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Id.* at 209. Indeed, when First Amendment freedoms are at stake, the Court has repeatedly emphasized that precision of drafting and clarity of purpose are essential. *Id.* at 217–18.

The FCC's regulation of speech per its *Order* fails to meet the rigorous standards of the Supreme Court. A look at *Erznoznik* will help illustrate why. There a municipal ordinance made it unlawful for a drive-in theater to exhibit any motion picture in which the

human male or female buttocks, human female bare breasts or human bare pubic areas where shown. The city attempted to sustain the ordinance as an effort to protect children. The Court held that minors are entitled to First Amendment protection and only in relatively narrow, well-defined circumstances may the government bar public dissemination of protected materials to them. *Erznoznik,* 422 U.S. at 212–13. The Court found the ordinance overbroad in that it sweepingly forbid the display of all films containing any uncovered breasts or buttocks, irrespective of context or pervasiveness. *Id.* at 213. Mr. Justice Powell, writing for the majority, stated that

> [s]peech that is neither obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

422 U.S. 213–14.

The situation in this appeal is quite similar to that in *Erznoznik.* The *Order* prohibits the broadcast of seven words at times of the day when there is a reasonable risk that children will be in the audience. Thus, the *Order* sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be. For instance, the *Order* would prohibit the broadcast of Shakespeare's *The Tempest* or *Two Gentlemen of Verona.* Certain passages of the *Bible* are also proscribed from broadcast by the *Order.*[19] Clearly every use of these seven words cannot be deemed offensive even as to minors.

[19] In addition, works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift and the Nixon tapes, would not be allowed to air.

In this regard the *Order* is overbroad. It is not saved by the attempted clarification, for that order would only permit the words to be broadcast on live news shows or very late at night.[20]

In addition, the *Order* is vague in that it fails to define children. Need a nineteen year old and a seven year old be protected from the same offensive language? The Supreme Court has held that in assessing the requisite capacity of individual choice the age of the minor is a significant factor.[21] The *Order* does not even consider age as a factor, much less a significant one.

The Commission also attempts to justify its *Order* by claiming that, due to the intrusive nature of broadcasting, a captive audience is present. This argument is persuasive when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. However, as the Supreme Court noted in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302 (1974), "[t]he radio can be turned off."

Cohen v. *California,* 403 U.S. 15 (1971), is also analogous to the present situation. Cohen was convicted of violating California Penal Code Section 415, which prohibits "maliciously and wilfully disturb-[ing] the peace or quiet of any neighborhood or person * * * by * * * offensive conduct * * *." Cohen had walked in a public corridor of the Los Angeles County Courthouse wearing a jacket inscribed with a four-letter word. California argued that the state may act to protect the unwilling or unsuspecting viewers from unavoidable exposure to such language. *Id.* at 21. This reasoning is similar to the FCC's expressed

[20] *Pacifica Foundation, supra,* note 8.

[21] *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970).

desire to protect the unsuspecting dial scanner from crude, offensive programming. In *Cohen,* the Court held that government control of objectionable speech can be tolerated only when substantial privacy interests are being invaded in an essentially intolerable manner. 403 U.S. at 21. Such an invasion had not occurred in *Cohen,* the Court found, because the offensive expression had occurred in public and because citizens could avoid it easily by averting their eyes. *Id.* Likewise, one can argue an intolerable invasion of privacy would not occur in the broadcast setting. Privacy expectations, even in the home, diminish when listeners choose to gain access to a public medium.[22] The dial scanner may avoid exposure simply by turning the dial. The Commission itself has recognized that listeners do not possess any right to be free from all unpleasantness.[23] In its effort to shield children from language which is not too rugged for many adults the Commission has taken a step toward reducing the adult population to hearing or viewing only that which is fit for children. The Commission's *Order* is a classic case of burning the house to roast the pig. *See Butler* v. *Michigan,* 352 U.S. 380, 383 (1957).

As defined by Congress, and refined by the FCC and the courts, public interest has always been understood to require licensees to offer some balance in their

[22] *See Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity,* 61 Va. L. Rev. 579 (1975).

[23] Clarification of Section 76.256 of the Commision's Rules and Regulations, 59 F.C.C. 2d 984 (1976).

program format. *See Renewal of Standard Broadcast and Television License,* 14 F.C.C. 2d 1, 8 (1968). Obviously balanced programming requires more than just programs suitable for children. Speech cannot be stifled by the government merely because it would draw an adverse reaction from the majority of the people. *Bazaar* v. *Fortune,* 476 F. 2d 570, 579 (5th Cir.), *modified,* 489 F. 2d 225 (1973).

The Commission assumes that absent FCC action, filth will flood the airwaves. Thus the Commission argues that the alternative of turning the dial will not aid the sensitive person in his efforts to avoid filthy language. The *Order* provides no empirical data to substantiate this assumption. Moreover, the assumption ignore the forces of economics and of ratings on the substance of programming. Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears.[24] Commentators and commissioners alike have noted that broadcast media require majorities, or at least sizeable pluralities, to pay the bills.[25] If they are correct, and if the Commission truly seeks only to

[24] *See Filthy Words, supra* note 18, at 615.

[25] *Id. citing* N. Johnson, How to Talk Back to Your Television Set, 20–21 (1967); N. Minow, Equal Time, the Private Broadcaster and the Public Interest.

enforce community standards, the market should limit the filth accordingly.[26]

Conclusion

As we find that the Commission's *Order* is in violation of its duty to avoid censorship of radio communications under 47 U.S.C. § 326 and that even assuming, arguendo, that the Commission may regulate non-obscene speech, nevertheless its *Order* is overbroad and vague, therefore we must reverse the *Order*. We should continue to trust the licensee to exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes. To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.

So ordered.

Bazelon, *Chief Judge, concurring*: Although I agree with the result reached by Judge Tamm, I be-

[26] *See Filthy Words*, *supra* note 18, at 615.

As a final word we take note of a news account which, under the headline "Swearing by British Rock Band Enrages Television Viewers", reported the reaction of the British television audience to a broadcast containing filthy language. According to the report members of a rock band had used a string of obscenities on a London television program which had aired at 6:00 p.m. (The Washington Post, December 3, 1976, Style section, at 7, col. 2) Following the broadcast thousands of angry calls jammed the switchboard at Thames Television Studios and thousands of others were received by the London newspapers in protest of the broadcast. Thames Television broadcast an apology later the same evening and the host of the program planned to make a personal apology on the air the following evening. In this instance it seems rather clear that the London community was offended by what it had heard and that its reaction thereto stemmed any tide of filth that may have been headed its way.

lieve it is necessary to determine whether the Commission's *Order* abridges the First Amendment. I will discuss why this issue must be reached and then explain why the Commission's definition of "indecent" speech is unconstitutional.

I

Judge Tamm concludes that the Commission's definition of "indecent" must be invalidated because it authorizes censorship forbidden by 47 U.S.C. § 326. Section 326 provides that nothing in the Communications Act shall be understood as giving the Commission "power of censorship" or authority to "interfere with the right of free speech." I agree with Judge Tamm that the Commission has censored.[1] The Commission has banned the broadcast of certain words during all but the late night hours, and possibly dur-

[1] Unfortunately, I am unable to agree with Judge Tamm's related conclusion that the Commission customarily honors the limitations on its authority to regulate constitutionally protected speech. *See* WUHY-FM, 24 F.C.C. 2d 408 (1970); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *recon. denied*, 34 F.C.C. 101 (1963), *affirmed on other grounds sub nom. Robinson* v. *FCC*, 334 F. 2d 534 (D.C.Cir.), *cert. denied*, 379 U.S. 843 (1964). *See also* Armond J. Rolle, 31 F.C.C. 2d 533 (1970); the "raised eyebrow" harassment of KRAB-FM in Jack Straw Mem. Foundation, 21 F.C.C. 2d 833, *hearing ordered on recon.*, 24 F.C.C. 2d 266 (1970), *license renewed*, 29 F.C.C. 2d 334 (1971); Mile High Stations, Inc., 28 F.C.C. 795 (1960); WREC Broadcasting Service, 19 F.C.C. 1082 (1955); Note, *Filthy Words, the FCC and the First Amendment: Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579 (1975); Note, *Offensive Speech and the FCC*, 79 Yale L.J. 1343, 1349, 1359–68 (1970), and cases cited. Ironically, one case where the Commission honored the limitations on its authority involved the same licensee, Pacifica Foundation, 36 F.C.C. 147 (1964).

ing those times as well.[2] The statute is thus facially violated, even though the ban is not absolute (as the Commission puts it, objectionable speech has merely

[2] The ban is not limited to words "as broadcast," as the dissenter asserts, (draft at p. 1–2), for the *Order* provides that language that is indecent under the Commission's standard may never be broadcast when children are likely to be listening. Instead of merely considering the words "as broadcast," the Commission adopted a legislative-type rule which it then applied to the facts of the case. As the Commission itself noted, it issued a declaratory order in this case because such a procedure is "admirably suited to terminat[ing] the present controversy * * * and to clarify[ing] the standards which the Commission utilizes to judge 'indecent language.'" 51 F.C.C. 2d at 434. It is true, though, that the adopted rule may not be applied at all times. During the late night hours, the *Order* cryptically states, a "different standard *might conceivably* be used." 51 F.C.C. 2d at 433 (emphasis added). The *Order* does not specify at what time the number of children in the audience will be sufficiently low to permit use of a relaxed standard. However, the Commission's own statistics show that in Washington, D.C., teenagers comprise 14.1 percent between 11:00 p.m. and midnight. *In re* WUHY–FM, 24 F.C.C. 2d 408, 411 n. 6 (1970). The Commission also found that in New York and Los Angeles, children of ages 11–17 comprise 13 percent of the 9:00 to 11:00 p.m. television audience, while those 6–11 comprise 5 percent. *Id.* This vagueness supports invalidation, not affirmation of the Commission's action.

The dissent recognizes that the Commission cannot constitutionally apply its rule at night when parents can supervise their children. (Dissenting draft at 10–11.) Under this logic, a similar conclusion would presumably be required when children are in school, possibly except during lunch hour and recess. The Carlin monologue was broadcast at 2:00 p.m. on Tuesday, October 30. *Order* at 431.

been "channeled" into certain hours).[3] By its terms, § 326 is not limited to rules that totally ban the broadcast of certain materials; it bans any Commission censorship.[4] Indeed, channeling may have substantially the same effect as an absolute ban. Channeling material into a small enough time slot would prevent many stations from airing that material[5] and would

[3] The Commission relies on *Williams* v. *District of Columbia*, 419 F. 2d 638 (D.C.Cir. 1969), and *Von Sleichter* v. *United States*, 472 F. 2d 1244 (D.C.Cir. 1972), for the proposition that regulation of offensive language should be governed by principles analogous to nuisance law. To the extent these cases permit a "nuisance" statute which proscribes words not obscene under *Miller* v. *California*, 413 U.S. 15 (1973), *see* text accompanying notes 7–9, *infra*, I think they are overruled by *Lewis* v. *City of New Orleans*, 415 U.S. 130, 134 (1974), and *Gooding* v. *Wilson*, 405 U.S. 518 (1972). In any event, the Commission misapprehends the meaning of "nuisance" as used in those cases. *Williams* and *Von Sleichter* do not hold that offensive words are a nuisance per se that can therefore be regulated. Rather, they relied heavily on the context in which the words were uttered, distinguishing the case of a stonemason who, after dropping a stone on his foot, utters swear-words that can publicly be heard, from the case of a person who verbally, rather than physically, assaults a person in a public place.

[4] The Senate Report regarding the 1948 amendment to § 326 states: [S]ection 326 * * * makes clear that *the Commission has absolutely no power of censorship* over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio.

S. Rep. No. 1567, 80th Cong., 2d Sess. 13014 (1948) (emphasis added).

[5] Amicus curiae, Committee for Open Media, San Francisco Chapter, asserts that roughly one-half of the nation's AM licensees (2,294 out of 4,488) operate only during the daytime. (Am. Br. at 18.)

effectively make it unavailable to many potential listeners.[6]

However, determining that the Commission has violated the literal command of § 326 does not, as Judge Tamm assumes, end the matter. Although the language of § 326 is very broad, the scope of that section is apparently limited by 18 U.S.C. § 1464 and 47 U.S.C. § 503(b)(1). Section 1464 provides criminal punishments for "[w]hoever utters any obscene, indecent, or profane language by means of radio," and § 503(b)(1) empowers the Commission to impose forfeitures on licensees who violated § 1464. In *Illinois Citizens Committee for Broadcasting* v. *F.C.C.*, 515 F. 2d 397 (D.C. Cir. 1974), the petitioners claimed that an obscenity forefeiture assessed by the Commission under the latter provisions violated both the First Amendment and § 326.[7] This court found that

[6] If material could only be shown after midnight, it would be missed by many people who have already gone to sleep. According to Nielsen, 70 percent of television households watch television between 9:00 and 10:00 p.m., 46 percent at 11:00 p.m., and 25 percent at midnight. *Nielsen Television, 1975*, p. 7.

[7] It is not entirely clear that the Commission is authorized to impose a forfeiture under § 503(b)(1) without a prior jury determination that § 1464 has been violated. The *Illinois Citizens Committee* court did not reach that issue. That appeal had been brought by a citizen group, rather than the fined licensee, and the court concluded the group lacked standing to raise the issue. 515 F. 2d at 403 n.13. The issue was not urged on this appeal. I merely note in passing that originally, the FCC was given enforcement powers over obscene broadcasts. *See Duncan* v. *United States*, 48 F. 2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). In 1948, the prohibition on obscene broadcasts was moved to Title 18 and nothing in Title 47 authorized the FCC to consider obscenity in a forfeiture proceeding. In 1960 Congress added § 503 to Title 47, Public Law 86–752, 74 Stat. 889. It was not stated whether the FCC was to have coordinate enforcement power with the Department of Justice. In any event, imposition of a fine would have been preferable to the "raised eyebrow" tactic the Commission used here.

the Commission had properly found that the program was constitutionally unprotected obscenity under *Miller* v. *California*, 413 U.S. 15 (1973). The forfeiture was upheld without comment on whether § 326 barred the Commission's action. The clear implication is that § 326 does not provide greater protection of speech than the First Amendment, at least with respect to offensive speech. If the court had thought otherwise, it could not have upheld the forfeiture simply by finding that the speech in question was unprotected under the First Amendment. Thus, to determine whether the Commission may regulate speech within its definition of "indecent," it is necessary to determine first whether such speech would be protected by the Constitution in other media; and if so, whether the unique character of broadcasting justifies the proposed expansion of government speech control.[8]

II

Several years ago, I felt compelled to write that "the FCC has demonstrated what one can most charitably describe as a total ignorance of the constitutional definition of obscenity." *Illinois Citizens Committee, supra*, statement of Bazelon, Chief Judge, as to why he voted to grant rehearing en banc, 515 F. 2d at 418. Unfortunately, this case would seem to confirm that view. The Commission's definition of "indecent" speech that may be banned from the airwaves is massively overbroad under *Miller* v. *California*, 413 U.S. 15, *rehearing denied*, 414 U.S. 81 (1973). Nor has the Commission demonstrated why offensive speech

The chilling effect of "associating" a finding of violation and threatening future unmentioned sanctions if the licensee's behavior does not improve is unmeasurable.

[8] Although the Commission evidently assumes that § 1464 authorizes it to assert control over speech that would be forbidden

that otherwise would be protected may be regulated at all when broadcast over the airwaves—or, specifically why the additional restrictions imposed are tailored to serve the justifications relied on for regulation.

Regulation of obscenity has produced "a variety of views among the members of the [Supreme] Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 704–05 (1968) (Harlan, J., concurring and dissenting). In *Roth* v. *United States,* 354 U.S. 476 (1957), a majority of the Court, although aware that "ideas having even the slightest redeeming social importance * * * have the full protection" of the First Amendment, concluded that there was a category of obscene speech that could be freely regulated because it lacked redeeming social importance. 354 U.S. at 484–85. After *Roth,* a majority or the Court retained the belief that obscene speech lies outside the First Amendment, the Court dividing over the difficult task of formulating a standard for distinguishing obscenity from that which is merely offensive. In the absence of a majority test, the Court initiated the practice,

(Continued)

in other media, 51 F.C.C. 2d at 432, neither the text nor the legislative history of § 1464 supports this view. But regardless of Congress' intent in passing § 1464, the grant of power to the FCC cannot exceed the bounds of the First Amendment. I will assume that the First Amendment sometimes may permit government to regulate broadcast speech more tightly than other speech, and that § 1464 empowers the Commission to assert the maximum amount of control over offensive speech permitted by the Constitution. On these assumptions it is not necessary to define all the modifications, assuming there are any, in traditional First Amendment principles that may be justified by the unique character of broadcasting. It is only necessary to determine whether the additional regulation embodied in the Commission's definition of "indecent" is permissible.

utilized thirty-one times, of summarily reversing convictions for the dissemination of materials that at least five Justices, applying their individual tests, found to be constitutionally protected. *Redrup* v. *New York,* 386 U.S. 767 (1967); *Miller,* 413 U.S. at 22, n.3. The Chief Justice believes this division of views "is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression." *Miller,* 413 U.S. at 22–23.

The Supreme Court's most recent attempt to resolve this uncertainty came in *Miller* v. *California, supra.* Acutely aware of the dangers inhering in any suppression of expression, the Court stated that the realm of permissible regulation must be "carefully limited." 413 U.S. at 23–24. A jury may find a work obscene "under contemporary community standards" only if the work (1) when taken as a whole, (2) appeals to the prurient interest, (3) portrays sexual conduct in a patently offensive way, (4) and lacks serious literary, artistic, political or scientific value. 413 at 24.[9] The Court further held that obscenity could be regulated only under a specifically defined law,[10]

[9] The fourth prong represents the major departure from prior case law. Previously, proof of obscenity required establishing that the material was "utterly without redeeming social value," *Memoirs* v. *Massachusetts,* 383 U.S. 413, 419 (1966). The *Miller* majority abandoned this strict test on the ground that it required the prosecution to do the impossible, namely, to prove a negative. 413 U.S. at 22.

[10] The *Miller* framework was followed in companion cases to assess the validity of federal regulation, *United States* v. *12 1200-Ft. Reels of Film,* 413 U.S. 123 (1973); *United States* v. *Orito,* 413 U.S. 139 (1973).

as written or authoritatively construed.[11] The Court said it had limited obscenity regulation to materials that "depict or describe patently offensive, hard core sexual conduct," *Id.* at 27. *See also, Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 69 (1972).

The Commission did not find that the Carlin monologue was obscene under *Miller.* Rather, it found that certain words repeated in the monologue were "indecent."[12] The Commission offered several justifications for "authoritatively construing" the statutory term "indecent," one of which was a desire to reformulate its earlier construction of that term in light of *Miller.*[13] Although the Commission alternatively argues that *Miller* is not the exclusive test for regulation of offen-

[11] To guide legislatures, the Court suggested two definitions of conduct that would satisfy the "patent offensiveness" prong of the test. The examples are:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25. Judge Leventhal asserts that by including these examples the Miller Court was authorizing "a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent." (Dissenting draft at 4). This was not the Court's intent. Just one paragraph before it offered these examples of patently offensive behavior, the Court explicitly held that the standards for measuring obscenity are conjunctive—all must be met to suppress speech. By giving flesh to the meaning of "patent offensiveness," the Court was not abandoning this holding.

[12] In constitutional interpretation the customary deference to agency regulations is inappropriate. *See e.g. National Broadcasting Co., Inc.* v. *FCC,* 516 F. 2d 1101 (D.C. Cir. 1974).

[13] The Commission also cited *Illinois Citizens Committee, supra,* as a case that compelled reconsideration of an earlier definition of indecency. However, that case simply involved judicial review under *Miller,* the court expressly refusing to consider the constitutionality of that definition and application of the term "indecent." 515 F. 2d at 403–04, n. 14.

sive language, *see* Section III *infra,* analysis of the Commission's definition must begin with *Miller.* To begin with, *Miller* establishes when speech in other media may be regulated because it is offensive in a lewd or vulgar way, *see* note 22 *infra.* Furthermore, the Commission has in the past attempted to define indecency in terms of the Supreme Court's standard for obscenity, 51 F.C.C. 2d at 433, and has theorized that unregulated, indecent speech will cause social harm similar to that which is commonly associated with unregulated obscenity.[14] Since the Supreme Court has held that the concerns underlying obscenity justify only limited regulation, regulation of indecency must be subject to similar restraints absent other, compelling justifications.

Judge Leventhal's dissent is based in part on his view that the Commission attempted to "define 'indecent' in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller.*" (dissenting draft at 3). Although the motiva-

[14] The Supreme Court has never definitively explained the justification for regulation of obscenity. Professor Kalven listed five possible justifications, all of which he found troubling; (1) the incitment to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; (4) the advocacy of improper sexual values; and (5) the impact of obscenity on character and hence, slowly and remotely, on conduct. Kalven, *Metaphysics of the Law of Obscenity,* 1960 S. Ct. Rev., 1. Little would be served by charting the history of the Supreme Court's acceptance or rejection of these and conceptually similar concerns. All that bears noting is the similarity of the Commission's fears regarding unregulated indecent speech: "Obnoxious, gutter language describing these matters [sexual and excretory activities or organs] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions. * * *" 51 F.C.C. 2d at 433. The Commission offered no empirical support for this proposition.

tions for regulating "indecent" and obscene speech do seem similar, the Commission's definition of indecency is massively over-broad under *Miller*. In fact, the Commission's definition disregards every *Miller* requirement but one.

To begin with, the Commission does not test the "indecency" of speech under "local community standards," but rather on the basis of what it terms "contemporary community standards for the broadcast medium." 51 F.C.C. 2d 433. The search for a national standard is understandable. Justice Brennan's argument, rejected in *Miller,* that a national standard of obscenity is appropriate under a national constitution is telling. *See Jacobellis* v. *Ohio,* 378 U.S. 184, 193–95. And *Miller* can be read as merely holding that application of local standards is constitutionally permissible rather than constitutionally required. 413 U.S. at 30–39. Finally, it may be that only a national standard is administratively feasible for the Commission. When scrutinized closely, however, the Commission's national standard appears chimerical. The Commission never solicited a jury verdict or expert testimony.[15] Nor did it rely on polls or letters of complaint.[16] The Commission simply recorded its conclusion that the words were indecent, thereby creating the suspicion that its national standard is in fact either the composite of the individual Commissioner's standards or what they suppose are the national standards.

[15] Although a jury verdict is evidently not required in obscenity cases in general, *Alexander* v. *Virginia*, 413 U.S. 836 (1973); *Illinois Citizens Committee*, *supra*, 515 F. 2d at 406, it would seem to be an exceptionally sturdy mechanism for soliciting community standards.

[16] I seriously doubt, in any event, that letters of complaint would provide reliable guidance as to what offends national standards of obscenity. Since a person is more apt to write a letter concerning a broadcast he finds offensive than one he does not, even a significant number of complaints might only reveal the sentiments of only a small minority of viewers.

The Commission's definition of indecency also disregards or distorts each of the other *Miller* requirements. First, appeal to the prurient interest is not to be considered. Second, a work is not judged as a whole. Rather, a work is banned if it contains "obnoxious, gutter language" that could be used offensively to describe sexual or excretory activities or organs. 51 F.C.C. 2d 433.[17] Finally, a work containing indecent langage cannot be broadcast even if the entire work has tremendous overriding literary, artistic, political or scientific value. *Id.*[18]

The only *Miller* requirement observed by the Commission is that the banned language be patently offensive. But uprooting this element from the others distorts its meaning. Under the Commission's definition, its *Order* could not itself be read over the airwaves even though it is not obscene under *Miller*. The *Order* has no appeal to the prurient interest and, as a whole, has serious value. Despite this, it would be banned because it contains words the Commission claims "debas[e] and brutaliz[e] human beings by

[17] Carlin's use of the "dirty words" was designed in part to demonstrate that they have acquired many popular meanings, apart from their literal meanings. For example, the phrase "I'm shitfaced" has nothing to do with an excretory activity or organ. It means, "I am drunk." The irony of the *Order* is that non-"obnoxious" synonyms for the dirty words (such as "feces" for "shit") are not banned even though such synonyms are only understood in their literal, "obnoxious," sense.

[18] Judge Leventhal argues that judicial review of Commission obscenity determinations compensates for the missing jury because "[j]udicial review would ensure the protection afforded by the Constitution to works professing literary, artistic, political or scientific value." (dissenting draft at 9). This statement is puzzling because, except possibly during the late night hours, a work containing indecent speech is banned regardless of its social value. 51 F.C.C. 2d 433.

reducing them to their mere bodily functions." 51 F.C.C. 2d at 433.

The Commission's definition of indecent speech that may be freely regulated thus goes well beyond *Miller* and is prima facie unconstitutional, notwithstanding the Commission's attempts to minimize the significance of the *Order*. In addition to its point about channelling, *see* text and notes at notes 1–6 *supra,* and its claim that only a few words will be affected, the Commission disclaimed any intent "to stifle robust, free debate." 51 F.C.C. 2d at 434. The implication is that only words and not ideas are being suppressed. However, the Supreme Court has rejected this very argument. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California,* 403 U.S. 15, 26 (1970). Since words "are often chosen as much for their emotive as cognitive force," *id.,* a person's choice of words is an important and protected element of the overall message sought to be communicated.

The Commission euphemistically characterizes its definition of indecency as "variable obscenity," citing *Ginsberg* v. *New York,* 390 U.S. 629. Under variable obscenity, the state can regulate dissemination of material to children that is obscene as to them, though not obscene as to adults. Variable obscenity "simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests * * * 'of such minors.'" *Ginsberg,* 390 U.S. at 628, citations omitted. Even assuming that variable obscenity can

be regulated under § 1464, the Commission's definition of indecency is not a proper application of that concept.[19] To illustrate, the Commission did not purport to find that the Carlin monologue, when taken as a whole, appeals to the prurient interests of minors or that it was without serious value to minors. And even if the Commission had properly found that the monologue came within this definition, that finding alone would not justify absolute or near absolute suppression; the material might not be obscene as to adults. Regulation of speech that is obscene as to children but that adults are constitutionally entitled to hear would present difficult problems of accommodation, problems that the Commission has not squarely faced because of its assumption that its broad regulation of indecent speech is constitutional.[20]

In sum, the tight limits on obscenity regulation carefully formulated by the Supreme Court in *Miller* have been thoroughly disregarded. The Commission's definition can be affirmed only if, as it alternatively argues, there exists an additional category of offensive speech that is unprotected when broadcast.

III

According to the Commission, certain qualities unique to the broadcast medium justify suppression

---

[19] *See* note 30 *infra.*

[20] The *Order* bans indecent speech whenever it is "reasonably likely" that children will be in the audience, which is all but the late night hours. Consequently, protected speech will not reach all who have a right to hear it, unless they are willing to forego sleep. *See Young* v. *American Mini Theatres,* 96 S. Ct. 2453, 2455 (1976) (Powell, J., concurring). *See* note 30 *infra.*

of otherwise constitutionally protected speech.[21] Conceptually, the Commission's claim is that speech meeting its definition of "indecent" constitutes, when broadcast, an additional, previously unrecognized category of unprotected speech.[22] No single Supreme

[21] 51 F.C.C. 2d at 432. The Commission relied on the following language from *Burstyn* v. *Wilson*, 343 U.S. 495, 502–03 (1952): "[E]ach method [of expression] tends to present its own peculiar problems." The Commission evidently concludes from this statement that different First Amendment standards govern regulation of speech in different media. However, the entire passage reads: "[E]ach method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."

[22] Supreme Court authority suggests that obscenity is to be the sole category of speech that is unprotected because it may offend the sensibilities of listeners. First of all, the Court's twenty-year struggle to define obscenity suggests that the Court does not intend to recognize an additional category under a different heading. Furthermore, beginning with *Roth*, the Court has used the term "obscenity" as a legal short-hand to describe what government may constitutionally regulate under statutes that proscribe, for example, "obscene, lewd, lascivious, or filthy [books] of an indecent character." *Roth*, 354 U.S. at 476, n. 1. *See, e.g., Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *12 200 Ft. Reels of Super 8 mm Film*, 413 U.S. 123 (1973); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962). Furthermore, there is an abundance of dicta in the Supreme Court's cases supporting this suggestion. *Miller* furnishes several examples:

> The States have a legitimate interest in prohibiting dissemination of exhibition of obscene material * * *. It is in this context that we are called upon to define the standards which must be used to identify * * * [what] a state may regulate.

413 U.S. at 19–20:

> We acknowledge, however, the dangers inherent in undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.

Id. at 23–24. And:

Court decision directly forecloses this argument. However, considerable guidance is contained in the several opinions in which the court has considered

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct * * *.

Id. at 27.

The implication of these and similar statements is that permissible regulation of offensive speech is co-extensive with *Miller*.

Finally, in several cases, perhaps best represented by *Cohen* v. *California*, 403 U.S. 15 (1971), the Court has overturned convictions based on offensive speech. In *Cohen*, a young man was prosecuted for walking through a courthouse wearing a jacket bearing the slogan "fuck the draft" and was convicted under a California statute that proscribed "maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person * * * by offensive conduct." Finding that the case did not involve obscenity, fighting words, a captive audience or any other category of speech that may be regulated, the Court was squarely faced with the question of whether the state could regulate words simply because they were offensive. The Court stated that offensive language was a necessary side effect of promoting the broader First Amendment value of open-ended debate and that the "principle [of selective suppression] contended for the State seems inherently boundless." 403 U.S. at 25. It concluded that Cohen's conviction was unconstitutional. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (display of nudity on a drive-in movie screen); *Lewis* v. *City of New Orleans*, 415 U.S. 130, (utterance of vulgar epithet); *Hess* v. *Indiana*, 414 U.S. 105, (utterance of vulgar remark); *Papish* v. *University of Missouri Curators*, 410 U.S. 667, (indecent remarks in campus newspaper); *Brandenburg* v. *Ohio*, 395 U.S. 444, (utterance of racial slurs); or *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, (alluring portrayal of adultery as proper behavior). *Cf. Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440 (1976), where a majority of the Court did not endorse the proposition that offensive though non-obscene expression may be regulated in some ways if not altogether banned.

254-987—78——6

conceptually similar justifications. All of the relevant case law directly opposes the action under review.

A. Offensive speech may offend the privacy interests of unconsenting adults in their homes

Two of the characteristics cited by the Commission are so closely intertwined that they should be considered together. The Commission fears that "unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast." It then observes that radio receivers are typically found in the home, where privacy interests are especially high, citing *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970). Since warnings can be aired prior to the broadcast of offensive material, the Commission evidently believes an adult listener should be able to indiscriminately scan the dial without chancing upon a program, even momentarily, he finds offensive.[23]

"The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205–210 (1974). Nevertheless, the Supreme Court has consistently held that the First Amendment generally prohibits government from "cleans[ing] public debate to the point where it is gramatically palatable to the most squeamish among us." *Cohen,* 403 U.S. at 25. In *Erznoznik,* for example, the Court held that a city ordinance banning the showing of movies containing nudity on

[23] According to the Commission, millions scan the dial every day. Sonderling Broadcasting Corp., 27 P&F RR 2d 285, 288, *recon. denied* 41 F.C.C. 2d 777 (1973), *affirmed sub nom.* Illinois Citizens Committee for Broadcasting, *supra;* WUHY-FM, Eastern Educ. Radio, 24 F.C.C. 2d 408, 411 (1970).

drive-in screens visible from the street could not be upheld in order to protect the sensibilities of involuntary passers-by. The Court said those who were offended could simply "avert their eyes." 422 U.S. at 211, 212. Similarly, in *Cohen, supra* n. 22, the Court held that offensive language could not be proscribed to protect the sensibilities of persons who might involuntarily be exposed to it:

> [T]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is * * * dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 23–34.

In *Cohen,* as in *Erznoznik,* the Court held the invasion on the privacy of unwilling viewers was not "intolerable" because of their ability to avert their eyes.

The Commission evidently believes that radio broadcast of offensive language constitutes an "intolerable invasion of substantial privacy interests." Radio waves are, as the Commission suggests, "intrusive" in some sense. They are "in the air" whether we like it or not.[24] But radio waves are not intrusive

[24] In its brief, the Commission quotes the following language from my opinion in *Banzhaf* v. *FCC* for the proposition that broadcast audience are "captive": "Written messages are not communicated unless they are read; and reading requires an affirmative act. Broadcast messages are 'in the air.'" 405 F. 2d 1082, 1100–1101 (1968), *cert. denied,* 396 U.S. 842 (1969).

in the same sense as "racuous emissions of sound trucks blaring outside * * * residences," which was cited as an example of an "intolerable invasion" in *Cohen*, 403 U.S. at 21.[25] Unlike the sound truck whose noise cannot be eliminated from the home even if desired, radio makes no sound unless a person voluntarily purchases it, bring it home and then switches it "on." Having done these things, having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erznoznik*;

Banzhaf, however, is totally inapposite. The *Banzhaf* court relied squarely on the announced policy of both the executive and legislative departments, which were themselves based on convincing evidence, that cigarettes are carcinogens. Hence the court weighed a relatively minor intrusion on free speech against an officially documented threat against life itself, 405 F. 2d at 1097–99. Furthermore, the case was not based on a captive audience rationale; the court merely suggested that a television viewer must make an affirmative effort to disregard the commercial interruptions on a program he is watching. *Id.* at 1100.

[25] The Court has in other cases added that while it is permissible to regulate the raucous emissions of sound trucks on the theory that people are entitled to have the tranquility and privacy of their homes protected from intrusions which they are themselves powerless to prevent, governmental regulation of the "time, place and manner" of expression must be content-neutral. *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972); *Erznoznik*, *supra*; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969); *Saia* v. *New York*, 334 U.S. 558 (1948); *Martin* v. *City of Struthers*, 319 U.S. 141, 151 (1943) (Murphy, J., concurring).

he can avert his attention by changing channels or turning off the set."[26]

There is language in *Cohen*, however, "that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g. Rowan* v. *Post Office Dept.* 397 U.S. 728 (1970)." 403 U.S. at 21. Although relied on by the Commission, *Rowan* does not in fact justify its *Order*. As the enunciation of the relevant test, citation of *Rowan*, and discussion of examples in *Cohen* suggest, *id.* at 21–22, the location of the unwilling listener is only one factor to be considered in determining whether speech is protected. Although a person *can* claim a greater privacy interest when at home, that interest is reduced when he "opens up his home" by turning on the radio. Indeed, when walking on the street one rarely receives prior warning of an offensive conversation.

Furthermore, the Commission's action is of an entirely different nature than that upheld in *Rowan*. There the Court upheld the constitutionality of a statute which enabled a person to require that a mailer remove his name from its mailing lists and stop all future mailings to the householder.[27] *Rowan* enables a person who is offended by mail sent from a certain source to avoid further offense from that source. This privacy interest is similar to that naturally enjoyed by the radio listener—the right not to listen to stations he finds offensive. The *Rowan* Court noted that similarity of these interests when it wrote that invalidating the statue,

[26] In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974), the Court noted, "The radio can be turned off, but not so the billboard or streetcar placard," *quoting Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932).

[27] 39 U.S.C. § 4009 (1964 ed., Supp. IV).

> would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home.

397 U.S. at 737. More importantly, as the *Rowan* Court noted, by empowering the homeowner to determine what mail he will not receive, Congress avoided the Constitutional problems involved in "vesting the power to make any discretionary evaluation of the material in a governmental official." *Id.* The Commission, by assuming this very power, has gone well beyond *Rowan*.

B. Presence of Children in the Radio Audience

The argument advanced most strenuously by the Commission is that the ban on "dirty words" is necessary to prevent "the exposure of children to language which most parents regard as inappropriate for them to hear." 51 F.C.C. 2d at 433. The Commission theorizes that regulation is necessary because parents will frequently be unable to shield their children from such programming. No one would dispute that there is a public interest in stations airing programming suitable for children or that government has greater power to regulate speech aimed at children than speech aimed at adults, *Ginsburg* v. *New York, supra.* However, it does not follow that the regulation under review is permissible.

First of all, the Commission incorrectly assumes that material regulatable for children can be banned

from broadcast.[28] In *Butler* v. *Michigan,* 352 U.S. 380 (1957), the Court invalidated a state statute that absolutely banned the publication, sale or distribution of reading materials inappropriate for children. The Court said:

> The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual * * * that history has attested as the indispensable conditions for the maintenance and progress of a free society.

352 U.S. at 383–84.

The Commission's *Order* has substantially the same effect. Adults with normal sleeping habits will be limited to programs "fit for children." Should the Commission choose to regulate variable obscenity in the future, it must accommodate the right of government to regulate material that is obscene as to children with the rights of adults to hear speech protected as to them. If the Commission finds it impractical to accommodate these interests, any regulation must err on the side of under- rather than over-regulation. Any harm from under-regulation may be minimized by pre-program warnings and parental supervision. Any harm from over-regulation, on the other hand, is irremediable.

In any event the Commission has not shown that the proposed regulation is permissible even with respect to children. Its position is based on several undocumented assumptions. The most basic assump-

---

[28] Since the *Order* only states that a more relaxed standard "might conceivably be used" during the late night hours, *see* note 2 *supra*, I assume the Commission believes it could impose an absolute ban. Nevertheless, for the rest of this paragraph I will assume the Commission will allow "indecent" speech to be aired late at night.

tion is that most parents consider any mention of dirty words to be unsuitable for their children. On top of this, the Commission assumes that parents frequently are unable to control their children's listening habits. A critical additional assumption (which I find difficult to accept) is that parents are less able to control their children's access to television and radio than to such media as books and newspapers. If this assumption is unfounded, then the major support for the Commission's argument that radio-TV should be distinguished from other media for speech regulation purposes is groundless.

Moreover, even if valid, those assumptions do not validate the *Order* since it rests on the premise that the Commission may censor material found by parents to be objectionable for their children. This unprecedented assumption [29] "seems inherently boundless," *Cohen,* 403 U.S. at 25. Parents might also wish to shield their children from programs advancing controversial political or religious beliefs or programs discussing difficult contemporary problems such as abortion. If the Commission can act *in loco parentis* by banning dirty words because they are objectionable, then the same logic justifies a ban on these and other types of programs.

Many parents believe—and perhaps rightly so—that children should not hear programs containing dirty

[29] The Commission improperly relies upon *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), where the Supreme Court held that an Amish parent's decision not to send his children to secondary school for religious reasons was constitutionally protected. *Yoder* recognizes that parents are entitled to make certain decisions respecting their children. This interest is infringed rather than promoted by the Commission's *Order*, which replaces parental authority with governmental authority.

words, and they may, of course, prevent their children from doing so. However, the Constitution limits the government's power to select programming for children. Although government may adopt more stringent controls with respect to children than adults on the theory that children lack the full capacity for choice that is the presupposition of First Amendment guarantees, *Ginsberg* v. *New York, supra, esp.* (Stewart, J. concurring), *at* 649–50, "[m]inors are entitled to a significant measure of First Amendment protection * * * and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik, supra,* 422 U.S. at 212. See also *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1969). In fact,

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable.

Erznoznik at 213–14.

Thus the *Order* is clearly overbroad insofar as it is based on protection of children. As noted above, *see* text and note at note 19 *supra,* the Commission cannot plausibly claim that speech meeting its definition of "indecent" satisfies the constitutional test of obscenity, even as adjusted for children. In order to find that dirty words were obscene as to children, the Commission would at least have to find that their use, in context, appeals to youthful prurient interest. This has not been done and, frankly, I do not see how in-

dividual words could ever be found obscene, even as to children.[30]

Nor can this broad restriction be justified by any other governmental interest pertaining to minors. In fact, the Commission's motivation in protecting children from dirty words is essentially that which *Erznoznik* forbids, namely a desire to shield children from what the legislature deems offensive.

In reaching this conclusion, I am not championing the "cause" of indecent speech. The use of dirty words on the air, like the prevalance of violence, is a serious concern. Without a heightened sensitivity of the media, the pressure on First Amendment values will continue to grow. Violence in programming, however, may be more objectionable than the use of off-colored language; after all, children do not learn to kill each other with dirty words. Nevertheless, the Commission recently refused to ban violence on television, citing First Amendment concerns. *Report on the Broadcast of Violent, Indecent, and Obscene Material,* 51 F.C.C. 2d 418, 420 (1975).

---

[30] *Ginsberg* v. *New York*, *supra*, which established the principle that obscenity could be assessed in relation to children, was decided before *Miller*. In *Erznoznik* the Court observed it had not had occasion to determine the effect of *Miller* on *Ginsberg*. However, the Court stated that not all nudity could be regarded as obscene as to children, because to be obscene expression must be in some way erotic. 422 U.S. at 213, n. 10. This statement implies that a finding of variable obscenity requires at least that the offensive material be judged in context and found to be prurient. In fact, there is language in *Miller* suggesting that the presence of children does not justify any additional regulation of speech: "This Court has recognized that the States have a legitimate interest in prohibiting disemination of obscene material when the mode of dissemination carries with it a significant danger or of exposure to juveniles. (Cites omitted). *It is in this context*, that we are called on to identify obscene material that a state may regulate * * *" 413 U.S. at 19–20 (emphasis added).

C. Scarcity of Spectrum Space

The final feature of broadcasting relied on by the Commission is the natural scarcity of broadcast channels. This reliance is misplaced. The ban on censorship in 47 U.S.C. § 326 reflects a Congressional judgment that scarcity does not justify content regulation. Indeed, although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.

The Commission relies on *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), where the Supreme Court upheld the constitutionality of the personal attack and political editorializing portions of the Commission's fairness doctrine. There the Court balanced the interests of broadcasters in freedom from control against the public's right to receive diverse viewpoints on matters of political importance. In this case, on the other hand, there is no divergence of First Amendment interests. The broadcasters' interest in freedom from content regulation is not incompatible with each member of the broadcast audience's interest in selecting his own programs and perhaps thereby attempting to influence the broadcaster's offerings. In fact, the *Red Lion* Court anticipated this situation when it wrote:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; * * * of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment isues.

395 U.S. at 396.

D. Miscellaneous justifications

The Commission also advances several subsidiary justifications for its action that are easily put aside. First, as Judge Tamm observes, the fear that filth will flood the airwaves without Commission regulation ignores economics. Popular tastes should be sufficient to ensure that the populace is not inundated with programming it finds objectionable.

Nor can the Commission's actions rest on its statutory obligation to promote the larger and more effective use of radio in the public interest. 47 U.S.C. 303(g). The Commission's statutory authority is not superior to the First Amendment. At most, specific components of the public interest can be relied on, as the Commission sought to do, to justify modifications in established First Amendment principles.

Finally, support for the Commission's action cannot be found in the fact government could have denied the public access to the airwaves altogether. I have long found such an argument puzzling. *See Brandywine-Main Line Radio, Inc.* v. *FCC,* 473 F. 2d 16, 67–68 (Bazelon, C. J., dissenting); Emerson, *The System of Freedom of Expression,* 660–61 (1970). Government also owns parkland and other facilities commonly used as public fora. Although the government may, in certain circumstances, forbid the use of certain locations altogether for public dialogue, any regulation it employs once it opens up a particular location for speech purposes must be content neutral. *Police Dept. of the City of Chicago* v. *Mosley, supra, Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969).

CONCLUSION

The impact of television [31] and radio has grown at an astonishing rate, and broadcasting promises to become by far the most influential medium of communications in our society. As its power continues to grow, preservation of free speech will hinge largely on zealously protecting broadcasting from censorship. As Chief Justice Warren once observed, the impact of a particular medium constitutes no basis for subjecting that medium to greater suppression:

> This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

Times Film Corp. v. *City of Chicago,* 365 U.S. 43, 77 (1969) (Warren, C.J., dissenting).

LEVENTHAL, *Circuit Judge, dissenting*: The Commission's declaratory order was issued in FCC File No. BRH–13. *In the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI (FM) New York, New York.* The Declaratory Order consists of sixteen numbered paragraphs, followed by an Ordering paragraph. In the footnote I set out the Commission's *Conclusion,* which contains the three final numbered paragraphs, together with the Order-

[31] The Commission construes § 1464 as applying to spoken words that are broadcast. Thus § 1464 applies to television dialogue. The Commission has asked Congress to update the statute to refer explicitly to video depiction. *Report on Violen*[*ce*], *supra,* 51 F.C.C. 2d at 424.

254–987—78——7

ing paragraph.[1] The majority vacates the order. I dissent.

The Appendix to this opinion contains the transcript of the George Carlin record. It may offend some sensibilities. But I think it important, especially because so many may be disposed to consider the matter in absolutist terms, just what material it is that the Commission has held was improperly broadcast in the

---

CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY-FM* and *Sonderling*. A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47

afternoon. This transcript is written, and it may well be more heavy handed than the monologue as heard on the radio. But counsel have not complained that the transcript format distorts or fails to present the issues.

I

The majority opinions treat the FCC's order as though it prohibited any TV or radio broadcast which included one of the seven words identified in the FCC's paragraph 14. The Commission held only "that the language *as broadcast* was indecent and pro-

---

U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 U.S.C. 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F. 2d 316 (1972); *Yale Broadcasting Co.* v. *FCC*, 155 U.S. App. D.C. 390, 478 F. 2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3)

hibited by 18 U.S.C. 1464".[2] The words were identified as depicting "sexual activities and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media", and further identified as "prerecorded language with the words repeated over and over * * * deliberately broadcast." But over and above the Commission's focus on the deliberate repetition of these words, was a clear and crucial emphasis on the timing of the broadcast. It was vital to the order that the words were broadcast "in the early afternoon" when "children were undoubtedly in the audience." The order specifically stated that the prohibition of the "broadcast of 'filthy words' considered indecent particularly when children are in the audience" would not force on the general listening public ideas "fit only for children."

Commissioners Reid and Quello stated that in their view the declaratory order should have gone further and prohibited such language at any time of the day or night. That was a minority expression. Chairman Wiley concurred only in the result. Commissioner Robinson, joined by Commissioner Hooks, concurred on the ground of time limitation, as a reasonable measure "to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children

ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

[2] 18 U.S.C. § 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

would not ordinarily be exposed to the material—or at least not without the supervision of a parent."[3]

[3] Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hardbitten libertarians do not find entirely uncongenial.[12] Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be though inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

[12] Even Mill, second to none in advancing a limited role for government, granted it broader role in regard to minors—those not "in the maturity of their faculties." *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in cases of "backward" societies, *Ibid.* I hope we do not qualify for that exception.

IV. Conclusion

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of

In light of this array of concurrences, the Commission's decision must be read narrowly, limited to the language "as broadcast" in the early afternoon.

II

Exposure to children marks a special enclave in the law of freedoms of publication. Even the dissent of Justice Brennan in *Miller* v. *California,* 413 U.S. 15, 47, abstained from discussing state power over distribution to juveniles. As to children, it is obvious that the state has more latitude to require that certain movies, which are not censored generally, should nevertheless not be exhibited in performances to which children under 16 are admitted. The problem is that radio-TV broadcasting cannot be handled in so tailored a fashion.

In regard to broadcasting, the probable presence of children in the radio audience is relevant to a determination of obscenity. So we held in *Illinois Citizens Committee for Broadcasting* v. *FCC,* 169 U.S. App. D.C. 166, 173, 515 F. 2d 397, 404 (1975).

The FCC opinion under discussion refers to what is "indecent" rather than what is "obscene." If the term "indecent" were stretched to cover what would normally be included as, say, sacrilegious, it would depart too far from the context of section 1464.[4] But as I read the FCC's order, it reflects an effort to

decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by *tour de force.* This agency, in my view, has the power to compel that co-existence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

[4] *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952).

define "indecent" in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller.* In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation.

The majority opinions seem to consider "indecent" as a novel concept in the law, which should in their view not be extended beyond control of the "obscene." They wholly fail to take account of one aspect of *Miller,* which has not been much analyzed but which seems to me to have been deliberate and significant. The pre-*Miller* rulings had always defined "obscene" in terms of what appeals to the lewd and prurient interest, *e.g. Roth* v. *United States,* 354 U.S. 476, 487, the concept that had previously been defined. But *Miller* expanded on this—to include "patently offensive representations of * * * excretory functions." 413 U.S. at 25.[5] This is in substance a stretch of the prohibition to go beyond the lewd obscene to the excretory indecent. And that is the *only* increment

[5] The concept of appeal to the prurient interest had previously been justified in some quarters on the ground that the material might stimulate sexual activity. Obviously, the representation of excretory functions would not stimulate excretory activity. It might sexually stimulate some seriously disturbed persons, but so might any fetish, such as a shoe. While *Miller* and accompanying opinions discourse at length on the possible nexus of obscenity and antisocial behavior, in the last analysis they do not depend on a showing or assumption of antisocial activity, but rather reflect a judicial conception that the law may give sanctions to the community's effort to avoid degradation of its quality of life and imposition on the privacy of others. See *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 59 (1973), referring to the view of Professor Alexander Bickel.

given to the term "indecent" in the FCC's opinion and order.

Mr. George Carlin is a comedian of stature, and a social satirist, but it is in the nature of social satirists to be provocative. He himself delivered his words as a biting commentary on what could *not* be heard on radio-TV, but he delivered them in a theater. A mature audience might appreciate not only the particular paradox, but the ongoing dilemma that every society has special vocabularies appropriate only for special groups, times and places. What the licensee did here was to broadcast them broadside, in houses and elsewhere; and to present the persistent, almost lavishly loving reiteration of the special words in an afternoon broadcast when children were likely in the audience. I cannot fault the FCC's order declaring that broadcast as indecent under 18 U.S.C. § 1464. TV-radio broadcasting has special access to the home, and home audiences are a primary target of the industry. In the home special considerations apply, with freedom from unwanted intrusion both by the government, *Stanley* v. *Georgia,* 394 U.S. 557 (1969), and by others presenting unwanted materials, *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970).

A concept like "indecent" is not verifiable as a concept of hard science. Its acceptance by and application by the FCC does not necessarily reflect, or depend upon, a determination by the FCC that this material would be dangerous to the children. What it reflects is a determination concerning a broad consensus of society, the view that the great bulk of families would consider it potentially dangerous to their children, and the further view that in our society, with the family as its base block, it is the family that should have the means to make that choice. With the pervasiveness of TV-radio and its reach into the home the choice

made by broadcasters precludes an effective choice by the family.

Because of the unique interest in home life, especially strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. In *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), there was a showing of a film in a drive-in theater, at night. Any children in the audience were not being reached at home. They had access only if, having been excluded from the theater, they sought out the film from a non-contemplated location. *Cohen* v. *California,* 403 U.S. 15 (1971), was a case of emphatic political speech, the otherwise offensive protest occurred in the courthouse, basically an adult locale, open only during the day. The reality of broadcasting's special access to the home conjoins with the passivity of TV-radio reception—a mere click, without current purchase. Indeed there is passivity after the click, with TV-radio stations being frequently left to a dial position previously set, unless there is an "alert" of some kind.

III

A crucial reality, dominating the case at hand, is the widespread access of radio to children. Radio is relatively inexpensive in initial capital cost, and virtually a free good in terms of operating expense. Widespread freedom of selection of programs by children is not only a condition, it is often a necessity. Today, a majority of families with school-age children have working mothers, and one out of five children in the United States live with only one parent, so that many children are at home unsuper-

vised during the day.[6] In this totality of conditions, one cannot waive away the radio-TV problem on the ground that the (mature) person can readily switch the channel.

It is no objection to the validity of the Commission's declaratory order that its protection will not be complete. It is likely that children will hear these words somehow, somewhere, and even at a relatively early age, but it makes a difference whether they hear them in certain places, such as the locker room or gutter, or at certain times, that do not identify general acceptability.

It is argued that the FCC's order is meaningless, because many children listen to TV-radio unsupervised even late at night. A ban would not be proved invalid by a showing that in some homes the parents habitually use such language in front of their children. Similarly, a daytime ban is not invalid because some parents give their children freedom in late hours. That does not show the ruling is futile, for it may still provide protection to a large part of the households of America. Nor is it sound to say that partial control must logically end in total prohibition, at all times and for all audiences. Licensees have the ability to make time distinctions. *See* In re *Pacifica Foundation,* 36 F.C.C. 147, 149 (1964) (noting that "Pacifica took into account the nature of the broad-

[6] Smithsonian, Feb. 1977, p. 13 (noting that "most kids are latchkey children"). *See also* N.Y. Times, Feb. 10, 1977, at 39, col. 3 (City ed). The most recent data appear in Bureau of the Census, Dep't of Commerce, *Marital Status and Living Arrangements: March 1976*, Series P-20 No. 306, at 7 (January 1977): "Eighty percent of the children under 18 years old in 1976 lived in families with both of their parents present, a decline from 85 percent in 1970." *See also* U.S. Dep't of Labor, *News Release* (February 25, 1977) (majority of children between ages 6 and 17 have mothers in the labor force).

cast medium when it scheduled [programs with sexual themes or indecent language] for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum").

The abhorrence of Censorship is a vital part of our society. But there is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience. What is entitled to First Amendment protection is not necessarily entitled to First Amendment protection in all places. *Young* v. *American Mini Theatres, Inc.,* 96 S. Ct. 2440 (1976). Nor is it necessarily entitled to such protection at all times.

Commissioner Robinson's apt citation of Justice Holmes[7] is rightly conjoined with a caution against the Ringing Phrase. We must beware of the distortion of doctrines and concepts that are pushed to extremes. In affirming the FCC's order, we would not be condoning a censorship that put the message of Mr. George Carlin off the air.[8] We would be authorizing reasonable steps that permit that message to find an audience, without pasting it on the youth. They

[7] *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908). ("All rights tend to declare themselves absolute to their logical extreme.")

[8] Moreover, it seems to me implicit in the Commission's order prohibiting the language "as broadcast" that the Commission does not intend to ban from the afternoon air waves every work of literature which contains one of these words. The monologue broadcast here was an exploration of obscenity, "with the words repeated over and over." FCC Conclusion at ¶ 14. It was very different from the plays of Shakespeare or the novels of Fielding, which may occasionally include, in the course of dealing with some larger theme, a word customarily indecent, and would be so regarded if not redeemed by the literary, artistic, political, or scientific context.

are impressionable, and likely to savor and repeat what they hear of the forbidden, without the maturity to distinguish between the different vocabularies and mindsets that every society harbors for different times and places.

Smut may drive itself from the market, and confound Gresham. So Judge Tamm suggests. Judges cannot, however, premise that there is not really a market that will endure.[9] In any event, there is a problem of the transition period. Even the most earnest advocates of freedom accept the role of government in protecting those who lack capacity.

IV

It is appropriate to acknowledge some inexactness in the agency's approach, and to say that this is an abiding discomfort but not a brand of invalidity. Vagueness is to some extent inherent in the subject matter, and is heightened by a procedure, of rulings in particular instances, that presents problems but also has virtues. The Supreme Court's long struggle with obscenity cases reflects the underlying complexi-

[9] The British Broadcasting Corporation experience cited by Judge Tamm (at p. 18) may not be transportable. The British began with commercial domination of the airwaves, and recoiled from its excess to develop BBC as a government agency, with a tradition of independence from the executive, that would operate in the public interest without the need for operating profits. The United States began with government operation of airwaves, which Herbert Hoover resolved should never be captured by commercial interests. But it later determined to permit radio (and later TV) broadcasting to draw on the energy of private enterprise—and that prime mover demands the spark of private profit. Whatever pornography's claim to constitutional protection, its basic reason for existence is to make money in the market. And if some publishers or broadcasters are engaged in disseminating the interdicted as a matter of principle, then the disapproval of the majority will not be a barrier, and might even be a spur.

ties, and those cases involved criminal sanctions. Nor is regulation of indecency precluded by the administrative agency setting. *Miller* has language that features the value of a finding by a jury representing the community. Yet *Miller's* continuation of an obscenity exception to freedom of press has been approved in other cases where there was no criminal prosecution and no jury.[10] I see no constitutional impediment either to an agency determination in the first instance, or to its use of an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review.

In the case of the Federal Communications Commission, there can be judicial review of any obscenity-indecency ruling at the instance of those who want to see and hear the material even if the licensee is ready to drop the matter. *Illinois Citizens Committee for Broadcasting* v. *FCC,* 169 U.S. App. D.C. 166, 515 F. 2d 397 (1974). Judicial review would ensure the protection afforded by the Constitution to works professing literary, artistic, political or scientific values.[11] The court would further guarantee that any determination of obscenity or indecency reflects the "hard look" by the agency appropriate where broadcast freedom and choice is limited.[12] Finally the court would require that the agency fully respect the licens-

[10] *United States* v. *Twelve 200 Ft. Reels of Super 8 mm. Film*, 413 U.S. 123 (1973); *Alexander* v. *Virginia*, 413 U.S. 836 (1973); *Star* v. *Preller*, 419 U.S. 955, *aff'ng mem* 375 F. Supp. 1093 (D.Md. 1974) (3-judge court).

[11] I would explicitly add "educational" values, see H. Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 ABAJ 1261, 1264 (1973).

[12] *WAIT Radio* v. *FCC*, 148 U.S. App. D.C. 179, 459 F. 2d 1203, *cert. denied*, 409 U.S. 1027 (1972); *Greater Boston TV Corp.* v. *FCC*, 143 U.S. App. D.C. 383, 444, F. 2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971).

ee's range of discretion, and not disapprove the licensee's action merely because the agency had a different view of the matter, but only because the licensee had gone so far as to be marked for an abuse of his license.[13]

V

What we have before us is the Federal Communications Commission order declaring the invalidity of particular language "as broadcast." That carries with it the limitations of time and deliberate repetition identified by the FCC.

The limitation of time is the *afternoon*. I am aware that the FCC's only indication of acceptability for the broadcast referred to the late hours of the evening.[14] But the issue of what might be broadcastable in the early evening is not before us, and raises different considerations. That would be a time when there were large numbers of children in home audiences generally, but the issue could be raised that for homes where parents really care about such matters there would be

[13] *Straus Communications, Inc.* v. *FCC*, 174 U.S. App. D.C. 149, 530 F. 2d 1001 (1976); *National Broadcasting Co.* v. *FCC*, 170 U.S. App. D.C. 173, 516 F. 2d 1101 (1975); *cert. denied*, 424 U.S. 910 (1975). Compare *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring: "I know it when I see it * * *").

[14] In addition to the reference in ¶ 16, quoted in the first footnote of this dissent, there is also paragraph 12, preceding the conclusion, as follows:

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivable be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. *Miller* v. *California*, *supra*.

at least one parent in a position to monitor the material heard and seen. A ruling expanding the zone of the broadcastable to adult levels might apply when the time of broadcast is such that the great preponderance of children are subject to parental control.

Under *Miller* matter is not "obscene" if it has literary, educational, artistic, political or scientific value, and accordingly is not "indecent" (under a *Miller*-analogue test) if it has such value. But the fact that it has such value for adults does not mean it has such value in a broadcast geared to children—or in a broadcast where a substantial number of children are likely to be in the audience without parental supervision.[15] A different question arises as to whether it may have such value for a broadcast during evening hours when children are likely to be in the audience, but are also likely to be under parental control, in the case of those parents who really are concerned with and want to avoid the exposure of their children. Such a program may have serious literary, artistic, political or scientific value for its audience—assuming the exclusion from the audience (due to opportunity for parental control) of most of the children who by disposition, training or understanding will be dominated by the blunt impact of the sexual and excretory words, and for whom the serious content will be non-existent.

There are certain aspects in which the FCC's order may be subject to particular question—both as to

[15] In *Ginsberg* v. *New York*, 390 U.S. 629 (1968) the Court upheld a state law providing distribution to minors under 17 of material not obscene for adults. Justice Brennan's majority opinion holds the legislation could properly support parents in their discharge of their primary responsibility for children's well-being, including the assessment of sex-related material "according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.'" *See* 390 U.S. at 639.

words interdicted [16] and as to the duration of the time span.[17] Those are not the objections to the order that were preserved for this court. I would reserve those for another time—as calling for a modification of the FCC order, on objections duly presented, but not an all-out condemnation.

VI

As a judge of what the Constitution calls an "inferior" court, my duty is to apply *Miller* unless and until the Supreme Court modifies it. Given the independence of a legal commentator (see note 11), I have voiced my gravest doubts concerning the vitality of *Miller's* effort to resolve the "intractable" question of obscenity. But even my personal approach would let freedom ring with some muffle of time and place as a constitutional tradeoff—to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and

[16] If the case had been presented from the start in a different way, I would have remanded for further consideration, to make the rulings and standards more specific in order to provide more information for other licensees, which is the FCC's purpose. For one thing, I am not clear why the word "tit" is in the FCC's Index, because it is neither a sexual nor excretory organ. The fact that Mr. Carlin included it in his list of the verboten does not mean that the FCC must adopt his position. But I do not think there is any material legal objection to the ruling sustaining the complaint against petitioner, on the basis of its broadcast.

[17] Chief Judge Bazelon offers the thought that children are not home at 2 p.m. (page 2 n.2). That is *not* the objection put before the FCC or argued on appeal. That objection would merit proof and agency reflection—on such matters as exposure of preschool age children, whether schools in the area served by the station let some children out before 2 p.m., etc. In this record, issue was not joined with the FCC's finding that 2 p.m. was a time when children were "undoubtedly in the audience." (Par. 14, quoted in note 1 of this dissent).

to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishiness, but reflects a value that Alexander Bickel identified (see note 5, *supra*) as society's concern with the quality of its community life. As for children, even assuming that children's exposure to pornography is an inevitable as pornography itself, there is protection in disapproval, in the child's knowledge that the pornography that is seen and heard is not approved by parents or society.[18] That much of a tradeoff is likely to persist under *Miller*, even if that decision is modified. It leads me to affirm the FCC's effort to apply *Miller* in the context of daytime broadcasting—when the protection of children is a compelling state interest.[19] I respectfully dissent.

[18] Compare the position of Professor Willard Gaylin, professor of psychiatry and law at Columbia University, presented in *The Prickly Problems of Pornography, Book Review of Kuh, Foolish Fig Leaves?* 77 Yale L.J. 579, 594 (1968):

"The child is protected in his reading of pornography by the knowledge that it is pornographic, that is, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement.

"If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego. The law is an instrument in the establishment of social behavior—and in the judging of it."

The foregoing was quoted in Justice Brennan's majority opinion in *Ginsberg* v. *New York*, 390 U.S. 629 at 642. When restating it recently, Professor Gaylin added: "The law, more than most lawyers seem to realize, is an ethical determinant and a moral force." W. Gaylin, *Obscenity*, Washington Post, Feb. 20, 1977, p. C–1.

[19] *Illinois Citizens Committee for Broadcasting* v. *FCC*, 169 U.S. App. D.C. 166, 174, 515 F. 2d 397, 405 (1975); *See Ginsberg* v. *New York*, 390 U.S. 629 (1968).

254-987—78——8

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu.

I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay. I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt,

cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the work cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock is in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? man, (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit, oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause, (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy, I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that. (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit. (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter). He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had

a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in a Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh, (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuc*k*. (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh,

we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love, (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you, (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list, I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no

problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat? Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. As, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can stay, stuff it! (murmur) There are certain things you can say it's weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight, and thank you also. (clapping, whistling)"

United States Court of Appeals
for the District of Columbia Circuit

September Term 1976

No. 75–1391

[Filed March 16, 1977, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communication Commission

Before: BAZELON, Chief Judge, TAMM and LEVENTHAL, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Communications Commission under review is hereby reversed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 16, 1977.

Opinion filed by Circuit Judge Tamm.
Concurring opinion filed by Chief Judge Bazelon.
Dissenting opinion filed by Circuit Judge Leventhal.

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1976

No. 75-1391

[Filed May 10, 1977, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

PACIFICA FOUNDATION, PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Before: BAZELON, Chief Judge; TAMM and
LEVENTHAL, Circuit Judges

Order

Upon consideration of the petition for rehearing filed by respondents Federal Communications Commission and United States of America, it is

ORDERED by the Court that respondents' aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge *Leventhal* would grant respondents' petition for rehearing.

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1976

No. 75-1391

[Filed May 10, 1977, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

PACIFICA FOUNDATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Before: BAZELON, Chief Judge; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges

Order

Upon consideration of the suggestion for rehearing *en banc* of respondents Federal Communications Commission and United States of America, and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc,* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

Circuit Judges *Leventhal, MacKinnon, Robb* and *Wilkey* would grant respondents' suggestion for rehearing *en banc.*

U.S. GOVERNMENT PRINTING OFFICE: 1978